

Family Business Resource Center PPP Webinar Series

Tim Fogerty, Managing Director- First Bank

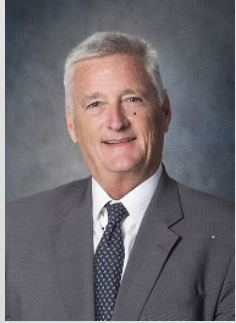
Eric Hallgren, Director - First Bank

Charles Jellinek, Partner- Bryan Cave Leighton Paisner LLP

August 5, 2020



Presenters:



Tim Fogerty, Managing Director, Commercial Banking- First Bank



Eric Hallgren, Director, Credit and Underwriting- First Bank



Charles Jellinek, Partner- Bryan Cave Leighton Paisner

AGENDA

- PPP Updates: Tim Fogerty, First Bank
- First Bank Forgiveness Process: Eric Hallgren, First Bank
- Return to Work Issues: Charles Jellinek, Partner-
Bryan Cave Leighton Paisner

Disclaimer

This presentation is furnished for informational use only. It is not intended to be comprehensive, nor does it constitute legal, accounting, tax or other professional advice. We encourage you to consult with your legal, tax and/or accounting professional for specific advice. This presentation is based on information available as of the first date and time of delivery of this presentation. Due to the evolving nature of the regulations and agency guidance addressing the Paycheck Protection Program, all information in this presentation is subject to change without notice.

First Bank recommends a thorough review of the CARES Act, PPP Flexibility Act, and SBA Interim Final Rules, these documents can be found at [FirstBanks.com](https://www.firstbanks.com)



PPP Communications

- First Bank has recently sent four secure emails to PPP borrowers with updates on the program.
- Emails were addressed to the person who signed the PPP loan and are sent from email-box: FirstBank_PPP_Forgiveness@fbol.com.
- We are tracking PPP borrowers that have not yet opened the emails. Please look for this communication, establish a password, and read the emails. You may need to check your spam or junk folder.
- If you cannot locate these emails, please reach out to your First Bank contact.
- Emails can be found in the addendum to this presentation.



PPP Communications

- First Bank will use this secure communication channel for the PPP Forgiveness process.
- PPP Borrowers can add one carbon copy (cc) to ongoing communications. To add a cc recipient respond to the secure email with the request and contact information. (Name and email address)
- First Bank will add a loan forgiveness application request link to the COVID-19 webpage.
- The First Bank forgiveness application process will be open when the SBA opens their application portal.

PPP Program Updates

- Long expected FAQ to clarify many PPP related issues was released late August 4, 2020. This document can be accessed at First Bank's COVID-19 webpage or the SBA website.
- SBA issued a procedural notice that indicated it would not begin accepting PPP forgiveness submissions from lenders until a new software-as-a-service (SAAS) platform which tentatively scheduled to go live on August 10, 2020.
- Congress is debating a new round of COVID-19 relief, which is expected to include a second PPP initiative more targeted than the first program. Those discussions also may include major changes relaxing the forgiveness requirements for a significant portion of PPP loans.
- SBA said launch of new platform could be delayed if new legislation changes the forgiveness process in ways that require changes to the platform.

Recommendations for Forgiveness Process



- Deadline for applying for forgiveness is 10 months after the end of the covered period which can be up to 24 weeks after your loan disbursement date.
- If your PPP loan is less than \$2 million, you will want to wait for the outcome of recently introduced legislation that may reduce the documentation for the loan forgiveness application.
- Take advantage of the extended covered period (24 weeks) to provide more payroll coverage for your forgiveness amount.



Recommendations for Forgiveness Process

- Review First Bank's website for past PPP Forgiveness webinars and slide decks for guidance and information on completing forgiveness applications.
- Review qualifications for PPP Loan Forgiveness Application Form 3508EZ.
- At this time there are two SBA Forgiveness Application forms:
 - PPP Loan Forgiveness Application Form 3508, revised June 16, 2020
 - PPP Loan Forgiveness Application Form 3508EZ revised June 16, 2020

First Bank – PPP Forgiveness Overview



First Bank has developed a standard PPP Forgiveness process that will be facilitated by two-way email communication with our clients.

The following slides will provide an overview on the following:

- Client Initiated Application Request
- Standard Forgiveness Application (Form 3508 or Form 3508EZ)
- First Bank Review & Submission Process

Client Initiated Application Request

I am ready to apply for PPP Forgiveness...now what?

Two different access options for submitting a PPP Application request:

1. Access First Bank Survey through link embedded in secure email campaign
2. Access First Bank Survey at: <https://www.firstbanks.com/COVID-19>

Request Form will require a client to identify the following:

- Tax ID Number
- Elect Covered Period: 8 weeks or 24 weeks
- Determine eligibility for Form 3508EZ

Upon submission the appropriate PPP Application in excel format will be emailed to the email address on file with certain data points prepopulated. Anticipate 24 hour turnaround upon submission.

Forgiveness Application (Form 3508)



Form 3508 – Example

Forgiveness Application (Form 3508EZ)



Form 3508EZ – Example

First Bank Submission & Review Process



I have completed my PPP Forgiveness Application...what is next?

Prepare to submit your PPP Forgiveness Application:

1. Review and validate all pages on the application are complete and accurate
2. Review, certify, sign and scan the Forgiveness Application
3. Prepare all supporting documents to justify all included Payroll and Nonpayroll covered expenses on the application (as appropriate)
4. Reply to First_Bank_PPP_Forgiveness@fbol.com and include the following attachments: Complete Excel Application, PDF Signature Page and all supporting documentation.

Each submission will be reviewed promptly for completeness. The client will be contacted directly for any missing or incomplete submissions.

All applications will be reviewed, validated and submitted to the SBA for forgiveness approval within 60 days of receipt.



SBA FAQ UPDATES

Question: If a borrower submits a timely loan forgiveness application, does the borrower have to make any payments on its loan prior to SBA remitting the forgiveness amount, if any?

Answer: As long as a borrower submits its loan forgiveness application within ten months of the completion of the Covered Period (as defined below), the borrower is not required to make any payments until the forgiveness amount is remitted to the lender by SBA. If the loan is fully forgiven, the borrower is not responsible for any payments. If only a portion of the loan is forgiven, or if the forgiveness application is denied, any remaining balance due on the loan must be repaid by the borrower on or before the maturity date of the loan. Interest accrues during the time between the disbursement of the loan and SBA remittance of the forgiveness amount. The borrower is responsible for paying the accrued interest on any amount of the loan that is not forgiven. The lender is responsible for notifying the borrower of remittance by SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable



SBA FAQ UPDATES

Question: Are only salaries or wages covered by loan forgiveness, or can a borrower pay lost tips, lost commissions, bonuses, or other forms of incentive pay and have such costs qualify for loan forgiveness?

Answer: Payroll costs include all forms of cash compensation paid to employees, including tips, commissions, bonuses, and hazard pay. Note that forgivable cash compensation per employee is limited to \$100,000 on an annualized basis.

Question: Is interest on unsecured credit eligible for loan forgiveness?

Answer: No. Payments of interest on business mortgages on real or personal property (such as an auto loan) are eligible for loan forgiveness. Interest on unsecured credit is not eligible for loan forgiveness because the loan is not secured by real or personal property. Although interest on unsecured credit incurred before February 15, 2020 is a permissible use of PPP loan proceeds, this expense is not eligible for forgiveness.



SBA FAQ UPDATES

Question: How is the amount of owner compensation that is eligible for loan forgiveness determined?

Answer: The amount of compensation of owners who work at their business that is eligible for forgiveness depends on the business type and whether the borrower is using an eight-week or 24-week Covered Period. In addition to the specific caps described below, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at \$20,833 per individual in total across all businesses in which he or she has an ownership stake. For borrowers that received a PPP loan before June 5, 2020 and elect to use an eight-week Covered Period, this cap is \$15,385. If their total compensation across businesses that receive a PPP loan exceeds the cap, owners can choose how to allocate the capped amount across different businesses.

Self-employed Schedule C (or Schedule F) filers: The compensation of self-employed Schedule C (or Schedule F) individuals, including sole proprietors, self-employed individuals, and independent contractors, that is eligible for loan forgiveness is limited to 2.5/12 of 2019 net profit as reported on IRS Form 1040 Schedule C line 31 (or 2.5/12 of 2019 net farm profit, as reported on IRS Form 1040 Schedule F line 34) (or for new businesses, the estimated 2020 Schedule C (or Schedule F) referenced in question 10 of "Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type"3). Separate payments for health insurance, retirement, or state or local taxes are not eligible for additional loan forgiveness; health insurance and retirement expenses are paid out of their net self-employment income. If the borrower did not submit its 2019 IRS Form 1040 Schedule C (or F) to the Lender when the borrower initially applied for the loan, it must be included with the borrower's forgiveness application.



SBA FAQ UPDATES

Question: Are payments made on recently renewed leases or interest payments on refinanced mortgage loans eligible for loan forgiveness if the original lease or mortgage existed prior to February 15, 2020?

Answer: Yes. If a lease that existed prior to February 15, 2020 expires on or after February 15, 2020 and is renewed, the lease payments made pursuant to the renewed lease during the Covered Period are eligible for loan forgiveness. Similarly, if a mortgage loan on real or personal property that existed prior to February 15, 2020 is refinanced on or after February 15, 2020, the interest payments on the refinanced mortgage loan during the Covered Period are eligible for loan forgiveness

Example: A borrower entered into a five-year lease for its retail space in March 2015. The lease was renewed in March 2020. For purposes of determining forgiveness of the borrower's PPP loan, the March 2020 renewed lease is deemed to be an extension of the original lease, which was in force before February 15, 2020. As a result, the lease payments made under the renewed lease during the Covered Period are eligible for loan forgiveness.



SBA FAQ UPDATES

Question: Covered utility payments, which are eligible for forgiveness, include a “payment for a service for the distribution of . . . transportation” under the CARES Act. What expenses does this category include?

Answer: A service for the distribution of transportation refers to transportation utility fees assessed by state and local governments. Payment of these fees by the borrower is eligible for loan forgiveness

Question: Are electricity supply charges eligible for loan forgiveness if they are charged separately from electricity distribution charges?

Answer: Yes. The entire electricity bill payment is eligible for loan forgiveness (even if charges are invoiced separately), including supply charges, distribution charges, and other charges such as gross receipts taxes.

Resources



- US Department of Treasury
<https://home.treasury.gov/>
- Small Business Association
<https://www.sba.gov/>
- First Bank's COVID-19 web page
<https://www.firstbanks.com/>



Appendix

Email #1: Thank You and General Info

Dear {Signer_FIRST_NAME},

Thank you for allowing First Bank to assist with your Paycheck Protection Program loan. First Bank is committed to supporting small businesses and we recognize that small businesses are the key to a thriving community.

In early June, the Paycheck Protection Program Flexibility Act was signed into law and created additional options for businesses to maximize their PPP loan forgiveness.

- Ability to use 60% or more of loan proceeds used for Payroll Costs.
- Extends the Covered Period option to 24 weeks, allowing more time to use proceeds for payroll costs.
- Lengthens the time frame to apply for forgiveness to 10 months from the last day of the Covered Period.
- Provides the Forgiveness Form 3508EZ for independent contractors, self-employed, and sole proprietors with no employees and borrowers who can meet the certification requirements.

First Bank will continue to send weekly emails providing you updates on the PPP loan forgiveness process. First Bank is preparing to accept applications beginning in early August however we are dependent on the SBA finalizing guidance on the forgiveness submission process. We hope you will join us for our PPP webinars to stay up to date on all aspects of the program. You can learn more at First Bank's COVID-19 webpage: [Learn More](#).

Best regards,

First Bank PPP Task Force

Email #2: PPP Flexibility Act – Impacts on Forgiveness

8/5/2020 Version 2

Subject: PPP Flexibility Act - Impacts on Forgiveness

Thank you for allowing First Bank to assist with your Paycheck Protection Loan. First Bank is committed to supporting small businesses and we recognize that Small Businesses are the key to a thriving community.

In early June, the Paycheck Protection Program Flexibility Act was passed into law and created additional options for businesses to maximize their PPP Loan forgiveness. Here are some key points to consider:

- **Covered Period:** Loans approved prior to June 5 can select an 8 week or 24 week Covered Period. Loans approved on or after June 5 will use a 24 week Covered Period. The purpose of this extension is to provide borrowers sufficient time to use proceeds to cover payroll costs and meet some forgiveness criteria.
- **Payroll Costs as a % of loan usage:** A minimum of 60% of proceeds should be used for payroll costs to qualify for full forgiveness.
- **FTE and Wage Reductions:** Salary or hourly wage reductions or FTE reductions will not reduce forgiveness if restored by December 31, 2020.
- **Deferral of Loan payments:** The earlier of 10 months after the last day of the Covered Period or when the SBA remits the loan forgiveness funds to the lender.
- **Safe Harbor 1:** Employee Eligibility: FTE reductions will not reduce forgiveness if the borrower can document in good faith the inability to rehire individuals who were employees on February 15, 2020; or the inability to hire similarly qualified employees for unfilled positions by December 31, 2020.
- **Safe Harbor 2:** Employee Availability and Compliance with HHS, CDC or OSHA: FTE reductions will not reduce forgiveness if the borrower can document in good faith an inability to return to the same business level of business activity as existed before February 15, 2020.
- **New Forgiveness Form:** Borrower can utilize the Form 3508EZ if one of 3 criteria apply:
 - 1) Self Employed, Independent Contractor, or Sole Proprietor
 - 2) Borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the Covered Period or the Alternative Covered Period compared to the period between January 1, 2020 and March 31, 2020 AND the Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period. Borrowers can ignore reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. Also to be ignored are reductions in an employee's hours that the Borrower offered to restore and the employee refused.
 - 3) Borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the Covered Period or the Alternative Covered Period compared to the period between January 1, 2020 and March 31, 2020 AND the Borrower was usable to operate during the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 31, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director for the Center of Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards

First Bank will continue to send weekly emails providing you updates on the PPP Loan Forgiveness process. First Bank is preparing to accept applications beginning in early August however we are dependent on the SBA finalizing guidance on the forgiveness submission process. We hope you will join us for our PPP webinars to stay up to date on all aspects of the program. You can learn more at First Bank's COVID-19 webpage: [Learn More](#)

Best Regards,

First Bank PPP Task Force

Email #3: PPP Forgiveness Preparation- Certifications

8/5/2020 Version 2

Dear {Signer_FIRST_NAME},

First Bank's PPP Forgiveness Process will use an interactive application process initiated through this email box. In early August, you will be provided a link to a survey to determine which SBA Forgiveness form is appropriate for your business (Form 3508 or Form 3508EZ). First Bank will review the results of the survey and send, via secure email, a customized application and certification documents.

As you prepare for the forgiveness process please review and consider the following certifications.

Certification of the Forgiveness Amount:

- 1) Used to pay costs that are eligible for forgiveness (employee payroll costs, business mortgage interest payments, business rent or lease payments, or business utility payments)
- 2) Includes all applicable reductions due to decrease in the number of full-time equivalent employee and salary/hourly wage reduction
- 3) Includes payroll of at least 60% of the forgiveness amount requested; and
 - a. 24 week Covered Period does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual /general partner, capped at \$20,833 per individual
 - b. 8 week Covered Period does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/ general partner, capped at \$15,385 per individual
- 4) General certifications include: fraudulent use of funds, use of safe harbors, completeness and accuracy of documentation, completeness of tax documentation, full acknowledgement and understanding of SBA and lender potentially asking for more information and potentially deeming loan forgiveness ineligible.

First Bank is monitoring legislative discussions surrounding a Cares 2.0/Phase IV package and extension of certain provisions of the Paycheck Protection Program, which is expected to include proposed changes to forgiveness rules. First Bank will provide updates via weekly secure email and the First Bank COVID-19 website. [Learn More](#)

Best Regards,

First Bank PPP Task Force

Email #4: PPP Forgiveness: Documentation Information

8/5/2020 Version 2

Dear {Signer_FIRST_NAME},

First Bank's PPP Forgiveness process will begin in early August. You will receive an email with a link to a survey to determine which SBA Forgiveness form is appropriate for your business (SBA form 3508 or form 3508EZ). First Bank will review the results of the survey and send, via secure email, a customized application and certification documents.

While preparing for the forgiveness process please review the following documentation requirements.

Documentation required when submitting the 3508EZ application:

- 1) Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
- 2) Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Covered Period
 - a. Payroll tax filings reported, or that will be reported, to the IRS (Form 941); and
 - b. State quarterly business, and individual employee wage reporting and unemployment insurance tax filings reports, or that will be reported, to the relevant state.
- 3) Payment receipts, cancelled checks, or account statement documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.
- 4) FTE: average number of FTE on payroll from 1/1/20 through the covered period.
- 5) Business Mortgage Interest Payments: copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
- 6) Business Rent or lease payments: copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
- 7) Business Utility payments: copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.

Additional documentation required when submitting the 3508 application:

- 1) Form 3508 Schedule A
- 2) FTE Documentation: (the borrower will elect which option below) The selected time period must be the same time period selected for purposes of completed PPP Schedule A line 11.
 - a. Average number of FTE employees on payroll per month employed by Borrower between February 15, 2019 and December 31, 2019
 - b. Average number of FTE employees on payroll per month employed by Borrower between January 1, 2020 and February 29, 2020
 - c. In the case of Seasonal Employer: average number of FTE employees on payroll per month employed by the Borrower between
 - i. February 15, 2019 and December 31, 2019; or
 - ii. January 1, 2020 and February 29, 2020; or

First Bank is monitoring legislative discussions surrounding a Cares 2.0/Phase IV package and extension of certain provisions of the Paycheck Protection Program, which is expected to include proposed changes to forgiveness rules. First Bank is hosting a webinar on Wednesday, August 5th covering PPP updates, best practices in policy and procedures on employment practices in a COVID-19 pandemic, and the First Bank forgiveness application process. Please visit the First Bank COVID-19 website to register for the webinar. [Learn More](#)

Best Regards,

First Bank PPP Task Force



Return to Work Issues

FFCRA Compliance & ADA Issues

Charles B. Jellinek

bclplaw.com

The FFCRA - General Overview

- **Families First Coronavirus Response Act (“FFCRA”)** requires covered employers to provide employees who cannot work (including telework) due to a COVID-19 related reason with:
 - Up to 80 hours of job-protected emergency partially paid sick leave (“PSL”); and
 - Up to 12 weeks of combined unpaid (2 weeks) and partially paid (10 weeks) job-protected emergency family and medical leave (“EFMLA”).
- Provides covered private employers with a payroll tax credit equal to 100% of the FFCRA wages (subject to caps) paid to employees
- Went into effect on April 1, 2020 and will remain in effect until December 31, 2020

FFCRA - Covered Employers

- **Employers covered by the leave provisions of the FFCRA include:**
 - Certain public employers
 - All private employers with fewer than 500 employees
 - Including nonprofits and religious employers
- **When counting employees:**

Include	Do Not Include
<ul style="list-style-type: none">• Employees based in the US (including DC and any territory)• Full time and part time employees• Employees on leave of any kind• Day laborers supplied by a temporary agency	<ul style="list-style-type: none">• Employees outside the US• Independent contractors• Laid off or otherwise terminated employees• Furloughed employees

- **Count employees of each employing entity separately, unless the entities are “joint employers” or “integrated employers”**
- **Do the calculation as of the date an employee’s leave will start**

FFCRA - Small Business Exception

- Only applies to employers with fewer than 50 employees, including religious or nonprofit organizations*
- Only applies to one type of leave: Child Care leave (under PSL and/or EFMLA)
- Employer must demonstrate that providing Child Care leave to specific employee would “jeopardize the validity of the business as a going concern.”
- Authorized officer must determine one of the following:

The leave would result in the employer’s expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity.	The absence of the employee would entail a substantial risk to the financial health or operational capabilities of the employer because of his or her specialized skills, knowledge of the business, or responsibilities.	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, and these labor or services are needed for the employer to operate at a minimal capacity
--	---	--

***In addition, such employers cannot be subject to civil action by employees in connection with EFMLA benefits**

FFCRA - Eligible Employees

Paid Sick Leave (PSL)	Emergency FMLA (EFMLA)
<ul style="list-style-type: none">All employees, regardless of length of employment with the employer	<ul style="list-style-type: none">All employees who have been employed for at least 30 calendar days*

- **Optional Health Care Provider / Emergency Responder Exception**
 - **Health Care Provider:**
 - DOL regulations broadly define term to include essentially anyone employed by a hospital, doctor’s office, health care center, clinic, etc. (“Medical Institution”) or anyone employed by an entity that contracts with a Medical Institution to provide services or maintain facility operations.
 - S.D.N.Y. invalidated regulation on August 3, 2020. Unclear now whether term will track with FMLA’s narrow definition of “health care provider” or something else.
 - **Emergency Responder:** any employee who is necessary for the transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19.
 - Anyone else identified by local government

***Special rule for employees terminated after March 1, 2020 and reemployed before December 31, 2020**

FFCRA - COVID-19 Related Reasons for Leave

The employee is unable to work (including telework) because the employee is...

Paid Sick Leave (PSL)	Emergency FMLA (EFMLA)
<ol style="list-style-type: none">1. Subject to a federal, state, or local quarantine or isolation order due to COVID-19;2. Advised by a healthcare professional to self-quarantine due to COVID-19;3. Experiencing symptoms of COVID-19 and is seeking medical diagnosis;4. Caring for someone who is subject to 1 or 2 above;5. Caring for the employee's son or daughter, because the child's school or child care provider is closed/unavailable due to COVID-19 precautions ("Child Care"); or6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.	<p>Caring for the employee's son or daughter, because the child's school or child care provider is closed/unavailable due to COVID-19 precautions ("Child Care").</p>

FFCRA - Amount of Leave; Intermittent Use of Leave

	Paid Sick Leave (PSL)	Emergency FMLA (EFMLA)
Amount of Leave	<ul style="list-style-type: none">• FTE: 80 hours• PTE: Number equal to number of hours worked on average in a two-week period	<ul style="list-style-type: none">• Maximum of 12 weeks of FMLA (including EFMLA) in 12 month period

Intermittent Use of Leave:

- **For employees who are working at the normal physical workplace location:**
 - Paid Sick Leave for all reasons other than Child Care may only be taken in full-day increments AND once leave is begun, leave must continue to be taken until all 80 hours are used or the qualifying reason no longer applies.
 - Leave for Child Care under Paid Sick Leave and/or Emergency FMLA may be taken in less than full-day increments.
- **For employees who are teleworking:**
 - Either Paid Sick Leave or Emergency FMLA leave may be taken intermittently.

FFCRA - Amount of Pay; Use of Accrued Paid Leave

	Paid Sick Leave (PSL)	Emergency FMLA (EFMLA)
Paid v. Unpaid	<ul style="list-style-type: none"> Entire time is paid 	<ul style="list-style-type: none"> First 2 weeks are unpaid (but employee may choose to use PSL or other accrued paid leave available for child care purposes concurrently) Remaining 10 weeks are paid
Amount of Paid Wages *Regular rate of pay is based on FLSA principles	<ul style="list-style-type: none"> Reasons 1, 2, or 3: Employee's regular rate of pay,* capped at \$511/day (\$5,110/aggregate)** Reasons 4, 5, or 6: 2/3 of Employee's regular rate of pay,* but capped at \$200/day (\$2,000/aggregate)** <p>**Quarterly payroll tax credits available only for these amounts</p>	<ul style="list-style-type: none"> 2/3 of Employee's regular rate of pay,* capped at \$200/day (\$10,000/aggregate)** <p>**Quarterly payroll tax credits available only for these amounts</p>
Use of accrued paid leave to run concurrently with (cover the same hours as) or to supplement (i.e., "top off" pay) FFCRA leave	<ul style="list-style-type: none"> Employer <u>may not</u> require employee to use accrued paid leave under paid leave policies before using PSL or concurrently with PSL Employer and employee may agree to use accrued paid leave under policies to "top off" pay to normal earnings 	<ul style="list-style-type: none"> Employer <u>may</u> require employee to use accrued paid leave under policies concurrently with <u>paid</u> EFMLA leave Employer and employee may agree to use accrued paid leave under policies to "top off" pay to normal earnings To run concurrently or be used for top off, such leave must be available for child care (e.g., vacation, PTO; not sick leave)

FFCRA - Compliance Steps

- **Training:**
 - Ensure managers are aware of employees' leave rights, along with the prohibitions on discrimination and retaliation against employees who request or take leave under the FFCRA
- **Poster:**
 - May be obtained from DOL website (multiple languages available)
 - Required to be hung in conspicuous areas of workplace; may post on internal website or email to employees
- **Policy:**
 - Recommended so the parameters of leave, and employees' rights and responsibilities, are clear

FFCRA - Compliance Steps

- **Forms:**
 - **Request Form:** Encouraged to ensure compliance with IRS requirements for tax credits, including documenting type of leave requested, amount of leave requested, employee certification of inability to work due to qualifying reasons, and other statements required for IRS purposes
 - **Form for Follow-Up Communications:** Encouraged to provide clear and documented communications with employees on key issues such as any additional information needed, any agreement regarding use of other paid leave; any agreement regarding intermittent leave; the designation of leave under the FMLA, any return to work requirements, etc.

FFCRA - Compliance Steps

- **Documentation for purposes of the tax credits – Must retain the following for 4 years:**
 - Employee’s written request for leave and accompanying statement / documentation
 - Documentation demonstrating how amount of FFCRA wages was calculated
 - Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS
 - 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)
- **Monitor DOL Guidance:**
 - DOL has continued to issue new informal guidance as the COVID-19 landscape evolves.
 - In light of recent court action, DOL regs likely to change.

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act – Overview of Provisions Relevant to the Current Pandemic

- Prohibits asking current employees disability related questions or require medical examinations
- Requires employee medical information be kept confidential
- Requires reasonable accommodation of qualified individuals with disabilities who request accommodation
- Prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm, even with reasonable accommodation)

ADA - Inquiries and Testing

- ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
- An inquiry or examination can be job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that an employee will pose a direct threat due to a medical condition.
- Based on guidance of the CDC and public health authorities, the EEOC has stated that the COVID-19 pandemic meets the direct threat standard.

ADA - Inquiries and Testing

- **Under current pandemic conditions (direct threat circumstances), an employer may now:**
 - **Require temperature screening of employees who are coming into the workplace.**
 - **Question employees entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or whether they have been tested.**
 - **Question employees whether they have had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease**

ADA - Inquiries and Testing

- When making inquiries or conducting testing, the following are best practices:
 - Follow a consistent process to avoid claims of disparate treatment
 - Ask all employees the same questions – use a questionnaire
 - If checking temperatures, check everyone
 - Use procedures and forms to make sure all employees are treated the same
 - Inquiries / tests of only a specific employee are permissible only if the employer has a *reasonable belief based on objective evidence* that this person might have the disease (e.g., an employee is demonstrating persistent COVID-19 symptoms)

ADA - Inquiries and Testing

Consequences for employee refusal to cooperate:

- An employer may exclude those with COVID-19 or COVID symptoms from the workplace because their presence would pose a direct threat to health or safety
- An employer may bar an employee from the workplace for refusal to answer questions about whether he/she has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19, as well as the ability to bar this employee's presence if he/she refuses to have his/her temperature taken.
- EEOC suggests that to gain the cooperation of employees, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace.

ADA - Confidentiality Concerns

- **The ADA Requires Employers Maintain Confidentiality of Employee Medical Information**
- **The CDC has likewise, specifically advised employers to maintain confidentiality of people with confirmed COVID-19.**
- **A supervisor, manager or HR professional who learns of an employee who has COVID may share that with:**
 - **The CDC or other health agency when requested**
 - **A limited, need to know management / HR group (limit to a discrete group)**
- **The identity of an employee with COVID may not be shared with the workforce, generally, or with others not in the need to know group.**

ADA - Confidentiality Concerns

- It is not an ADA confidentiality violation for an employee to inform his supervisor about a co-worker's symptoms. If an employee notices or observes a co-worker exhibiting symptoms, the employee can tell his supervisor what he or she has observed.
- The supervisor should then disclose to only those whom the employer has designated as the discrete, need to know group in management or HR.

ADA - Confidentiality Concerns

Best practices:

- **When communicating with the workforce about an employee who has been diagnosed with COVID, say only that the employee is:**
 - **Working remote (if he or she is still working)**
 - **On leave**
 - **And in either case, do not say why**
 - **Even if the workforce can figure it out, the employer should not reveal that information**
- **Even where the employer must make contact with other employees who may have been exposed by the positive case employee (for isolation and quarantine purposes) the identity of the positive case employee should not be disclosed.**

ADA - Accommodating Employees

ADA Requires Reasonable Accommodation When Requested

- What are an employer's obligations when an employee says that he/she has a disability that puts the employee at greater risk of severe illness if he/she contracts COVID-19, and therefore asks for reasonable accommodation?
- Business as usual under the ADA:
 - An employee still must inform the employer that he or she needs a change for a reason related to a medical condition.
 - The employer must, in good faith, engage in the interactive process by asking questions and/or seeking medical documentation to help determine whether the individual has a disability and whether there is a reasonable accommodation, barring undue hardship, that can be provided.

ADA - Accommodating Employees

ADA Requires Reasonable Accommodation When Requested

- The CDC has identified a number of medical conditions -- including, for example, chronic lung disease and serious heart conditions -- as potentially putting individuals at higher risk.
- In light of these conditions, many employees with such conditions have requested to work remotely – which is clearly a request for reasonable accommodation – i.e. a request for a change in the workplace due to a medical condition.
- The employer may verify that the employee does have a disability, as well as verifying that the accommodation is needed because the particular disability may put the individual at higher risk. There could also be situations where accommodation is requested because a current disability is exacerbated by the current situation.

ADA - Accommodating Employees

ADA Requires Reasonable Accommodation When Requested

- As with any request for reasonable accommodation, an employer may also consider whether an accommodation would pose an undue hardship, meaning whether a specific form of accommodation would pose significant expense or significant difficulty.
- In assessing the existence of a disability and need for accommodation, be mindful that because of the pandemic, a doctor may have difficulty responding. Other ways to verify the existence of a disability:
 - Health insurance record
 - Prescription
- If the employer is waiting to receive documentation, it might consider providing the accommodation on a temporary basis.

ADA - Accommodating Employees

ADA Requires Reasonable Accommodation When Requested

- Does an employer have an obligations to provide reasonable accommodation if an employee says that he lives in the same household as someone who due to a disability is a greater risk of severe illness if he or she contracts COVID-19?
- No. The employee only has a right to reasonable accommodation for his own disability. In the situation being raised here, the employee does not have a disability, only a member of his household.

ADA - Accommodating Employees

Post-Pandemic Trap

- Assume that prior to the emergence of the pandemic, an employee with a disability had requested remote work as an accommodation, but the employer denied the request because of concerns that the employee would not be able to perform the essential functions remotely.
- In the past, the employee therefore continued to come to the workplace. However, after the pandemic subsides and temporary telework ends, the employee renews the request for the telework accommodation. Can the employer refuse the request?

ADA - Accommodating Employees

Post-Pandemic Trap

- The EEOC has noted in its recent guidance that the temporary remote work during the pandemic could be relevant to considering the renewed request.
- In this situation, the period of providing telework because of the pandemic could serve as a trial period that demonstrated whether or not the employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.

ADA - Excluding Employees

Can an employer bar high risk employees from coming to work?
The answer is no.

- When the EEOC initially released guidance on this topic back in March, some readers misinterpreted the guidance to allow concerned employers to prohibit employees with underlying medical conditions to return to work.
- The EEOC retracted the original guidance, replaced it, and clarified that: “If the employer is concerned about the employee’s health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at ‘higher risk for severe illness’ if he gets COVID-19.”

ADA - Excluding Employees

- An employer can only prohibit a high risk employee from returning to work if the employer can show both that the employee's disability poses a "direct threat" to the employee's health, *and* that this direct threat cannot be eliminated or reduced to an acceptable level by a reasonable accommodation.
- As a practical matter, proof of a direct threat can be very difficult, and there are often measures short of barring an employee from work that might eliminate the threat.

Excluding Older Employees?

It is also not permissible for an employer to exclude employees from the workforce based upon an employee's age.

- The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave.
- Conversely, the EEO laws do not require an employer to grant a request to telework from an employee who is 65 years old or older because the CDC says older people are more likely to experience severe symptoms if they get COVID-19. The ADEA does not itself have an accommodation provision like the ADA. However, if an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers differently based on their age.

Excluding Pregnant Employees

It is also not permissible for an employer to exclude employees from the workforce based upon pregnancy.

- The CDC's list of higher risk individuals includes a recommendation to monitor women who are pregnant.
- But, an employer may not furlough or prohibit a pregnant woman from the worksite if she does not have COVID-19 or COVID symptoms. Pregnant employees are protected under Title VII. Employment actions based on pregnancy are “based on sex,” so decisions of this type should not be based on pregnancy.
- An employer is also required to accommodate pregnant employees.

Resources

- The EEOC has issued a number of helpful bulletins and guidance to the extent you have further questions about ADA or other EEO issues related to the pandemic - <https://www.eeoc.gov/coronavirus>
- **BCLP Coronavirus Resources** - <https://www.bclplaw.com/en-US/topics/covid-19/coronavirus-covid-19-resources.html>
- **BCLP at Work – The BCLP Employment Law Blog** - <https://bclpatwork.com/>
- **Charles Jellinek**
 - cbjellinek@bclplaw.com
 - 314-259-2138



Questions



Thank You