

TO: NAW Direct Members

FROM: NAW Government Relations Team

RE: NAW Critical Update Number 48 – May 13 at 3:30 PM

1. Latest on the Main Street Lending Program

As of today – yet again – no MSLP launch date has been announced. We will continue to monitor the Federal Reserve for information and provide you with any relevant and timely updates.

2. Latest on the Paycheck Protection Program

As we have been reporting, the Treasury Department and Small Business Administration have significantly re-written the PPP loan criteria, in an attempt to discourage companies that they believe were not intended to benefit from the program from applying for and/or getting loans. In their ever-changing FAQ they provided a “safe harbor” date of May 7th, then moved to May 14th, by which companies could return their PPP loans without consequences. This was significant since the Treasury Secretary was then threatening prosecution of companies that did not certify their qualifications in good faith.

That safe harbor expires tomorrow and until this morning there was no further guidance from the SBA or Treasury on the loan forgiveness – a significant piece of information for a company trying to decide whether to keep or return a loan.

This morning a notice was published in the Federal Register that reads: “BUSINESS LOAN PROGRAM TEMPORARY CHANGES: Paycheck Protection Program – Requirements – Extension of Limited Safe Harbor with Respect to Certification Concerning Need for Paycheck Protection Program Loan Request.”

However, instead of information on details of an extended safe harbor, this appears in the Register: “**Editorial Note:** An agency letter requesting withdraw of this document was received after placement on public inspection. The document will remain on public inspection through close of business May 13, 2020. A copy of the agency's withdrawal letter is available for inspection at the Office of the Federal Register.”

Along with that inexplicable Federal Register publication, the Treasury Department released yet another updated FAQ today, with Question 49 dealing with this matter. The FAQ says that a borrower with a loan of under \$2 million will be presumed to have made the loan certification in good faith, that borrowers of larger amounts will be reviewed and may still “have an adequate basis for making the required good faith certification,” that borrowers deemed to “lack an adequate basis” for the certification will be asked to return the money, and that Treasury will not refer the issue to other agencies if the borrower returns the loan.

This still leaves unanswered questions, i.e., what precisely they mean by “access to credit” as a condition for certification for a loan, and what would the terms be for repayment of a loan if a borrower is asked to do so. Hopefully clarification of those and other issues will be forthcoming.

You can read Question/Answer 49, and find a link to the full FAQ, below:

Question 49: *How will SBA review borrowers’ good-faith certification concerning the necessity of their loan request?*

Answer: *When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Application.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the request in good faith.*

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than \$2 million that do not satisfy the safe-harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the

certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

To view the full FAQs, go to:

<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

According to a *Washington Post* story yesterday, the Post is among five news organizations suing the Small Business Administration for access to government records showing who received more than \$700 billion in taxpayer-backed small-business loans.

The news organizations are seeking access to records showing who received subsidized loans under both programs, the size of each loan and which bank processed the loan, as well as other loan-specific information. Separate requests submitted in April by all five media organizations under the Freedom of Information Act, known as FOIA, failed to produce a loan-specific database, even though the SBA has published that information in the past as part of its loan program.

To read the full story, go to:

<https://www.naw.org/wp-content/uploads/2020/05/Post-Among-5.pdf>

3. Latest Congressional Action on the Next Coronavirus Relief Package HEROES Act

Yesterday, House Democrats' introduced the HEROES Act, a \$3 trillion coronavirus response bill that boosts unemployment insurance and direct payments to individuals, sends roughly \$1 trillion to state and local governments and adds a variety of other non-Covid related measures. However, Senate Republicans quickly rejected the bill.

Senate Majority Leader McConnell called the HEROES Act “aspirational” and said several times he doesn’t plan to act immediately on another round of stimulus legislation. While Speaker Pelosi’s 1,815-page proposal won’t become law in its current form, it does put a spotlight on Democratic proposals, which could be helpful for Democrats if and when conservatives feel the need to take up another bill in the Senate. House Majority Leader Hoyer said the House will vote on the bill Friday.

Little’s latest publication discusses the HEROES Act’s labor and employment provisions that are significant to employers, including expansion of prior laws, and new proposals aimed at providing relief to workers during the public health emergency.

To read the full report, go to:

[House Democrats Unveil “Phase 4” COVID-19 Relief Legislation, Including Expansion of Paid Sick and Family Leave, Hazard Pay, and Unemployment Benefits.](#)

Meanwhile, Senate Republicans are assembling their own ideas for a relief package that could pass sometime this summer. Yesterday, Senate Leader McConnell subtly shifted from last week’s call for a pause by instead emphasizing the need for additional coronavirus legislation to be narrowly targeted. “We’re going to insist on doing narrowly targeted legislation if and when we do legislate again, and we may well,” he told reporters yesterday.

The two core proposals that have emerged from Republican Senators so far are litigation protections for businesses that re-open while the pandemic is still going strong and a reform of beefed-up unemployment benefits that Congress approved in March that critics say are making it tougher to hire back workers. Senator John Cornyn who has been tasked with overseeing the litigation reform effort, said the Republican litigation protection plan could be unveiled in the next several days along with a proposal to give unemployed workers more incentive to rejoin the labor force.

4. Latest on Liability Protections for Businesses

During a Senate Judiciary Committee hearing yesterday to examine employer liability, Chairman Lindsay Graham said the government must “tell the employers what they need to do to protect the workers and hold them accountable if they don’t.”

Witnesses at the hearing, representing both labor and businesses, agreed that enforceable rules could give workers recourse while providing employers a defense in

cases and certainty in re-opening, although business witnesses and many of the Republicans on the panel argued for reforms to the liability system.

“It seems to me that one primary goal out of this hearing is to get the standards in place for business,” said Senator Graham. “The big hole in the puzzle right now is the standards.”

One business witness, Kevin Smartt, CEO of Kwik Chek Food Stores Inc. said, “I’m asking this committee for a very limited-time liability protection for businesses. I’m not looking for bad actors or people that were grossly negligent.”

As *The Hill* reported yesterday, the Senate Judiciary Committee called on the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) to establish national safety guidelines for industries amid the coronavirus pandemic.

To read *The Hill* story, go to:

<https://thehill.com/homenews/senate/497437-senate-judiciary-hearing-on-liability-shield-leads-to-calls-for-national>

5. U.S. Department of Labor Issues Additional Informal Guidance on Paid Sick Leave and Expanded Family and Medical Leave

Yesterday, the DOL added additional questions and answers to its [FFCRA FAQs page](#). *Squire Patton Boggs Law Firm* published an article today offering summaries on the DOL’s answers.

To view the article, go to:

<https://www.employmentlawworldview.com/us-department-of-labor-issues-additional-informal-guidance-on-families-first-coronavirus-response-act-us/#page=1>

The FAQ update continues the DOL’s pattern over the past two months of releasing informal guidance in small doses. We expect the practice to continue in the coming weeks and months, and we will update the you as it does. New:

Question 88: If my employer refuses to provide paid sick leave or refuses to compensate me for taking paid sick leave, and the Department brings an enforcement action on my behalf, am I entitled to recover just the federal

minimum wage of \$7.25 per hour of leave, or can I recover the entire amount due under the FFCRA?

Answer: *If the Department brings an enforcement action on your behalf, you are entitled to recover the full amount due under the FFCRA (see [Question 7](#)), which is the greater of your regular rate (see [Question 8](#)) or the applicable minimum wage (federal, state, or local) for each hour of uncompensated paid sick leave taken, in each case, subject to the applicable FFCRA maximums (see [Question 7](#)). The FFCRA and the Department's regulations state that an employer who does not compensate you for taking paid sick leave is "considered to have failed to pay the minimum wage ... and shall be subject to the enforcement provisions" of the Fair Labor Standards Act. Those enforcement provisions state that the employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages." For the purposes of the FFCRA, the "amount of unpaid minimum wages" does not refer to the federal minimum wage of \$7.25 per hour, but rather to the hourly wage at which the employer must compensate you for taking paid sick leave, which is, generally, the greater of your regular rate or the applicable minimum wage (federal, state, or local).*

Thus, if the Department brings an enforcement action on your behalf, your recovery against an employer that refuses to compensate you for taking paid sick leave would not be limited to the federal minimum wage of \$7.25 per hour if your regular rate or an applicable state or local minimum wage were higher. For example, if your regular rate were \$30 per hour and you lawfully took 20 hours of paid sick leave to self-quarantine based on the advice of a health care provider, you may recover \$600 (\$30 per hour times 20 hours) from your employer. As another example, if you were entitled to a state or local minimum wage of \$15 and lawfully took 20 hours of paid sick leave for the same reason, you may recover \$300 (\$15 per hour times 20 hours). However, you may not recover more than the amount due under the FFCRA. For instance, if your employer initially agreed to pay your full hourly rate of \$30 per hour to allow you to take paid sick leave to care for your child whose school is closed, but then pays you only 2/3 of your hourly rate, as required by the FFCRA, you may not recover the unpaid portion of the initially agreed amount because your employer was not required by the FFCRA to pay that portion.

Question 89: *I hire workers to perform certain domestic tasks, such as landscaping, cleaning, and childcare, at my home. Do I have to provide my domestic service workers paid sick leave or expanded family and medical leave?*

Answer: *It depends on the relationship you have with the domestic service workers you hire. Under the FFCRA, you are required to provide paid sick leave or expanded family and medical leave if you are an employer under the Fair Labor Standards Act (FLSA), regardless of whether you are an employer for federal tax purposes. If the domestic service workers are economically dependent on you for the opportunity to work, then you are likely their employer under the FLSA and generally must provide paid sick leave and expanded family and medical leave to eligible workers. An example of a domestic service worker who may be economically dependent on you is a nanny who cares for your children as a full-time job, follows your precise directions while working, and has no other clients.*

If, on the other hand, the domestic service workers are not economically dependent on you and instead are essentially in business for themselves, you are their customer rather than their employer for FLSA purposes. Accordingly, you are not required to provide such domestic service workers with paid sick leave or expanded family and medical leave. An example of a domestic service worker who is not economically dependent on you is a handyman who works for you sporadically on a project-by-project basis, controls the manner in which he or she performs work, uses his or her own equipment, sets his or her own hours and fees, and has several customers. Likewise, a day care provider who works out of his or her house and has several clients is not economically dependent upon you.

Of course, you are not required to provide paid sick leave or expanded family and medical leave for workers who are employed by a third-party service provider with which you have contracted to provide you with specific domestic services.

Ultimately, the question of economic dependence can be complicated and fact specific. As a rule of thumb, but not ultimately determinative, if you are not required to file Schedule H, Household Employment Taxes, along with your Form 1040, U.S. Individual Income Tax Return, for the amount you pay a domestic service worker because the worker is not your employee for federal tax purposes, then the worker is likely not economically dependent upon you and you are likely not the worker's employer under the FLSA. In this case, you likely would not be required to provide paid sick leave and expanded family and medical leave. If the worker is your employee for federal tax purposes, so that you are required to file Schedule H for the worker with your Form 1040, you will need to determine whether the worker is economically dependent on you for the opportunity to work.

If you determine that the worker is economically dependent upon you for the opportunity to work, then you are likely required to provide that worker with paid sick leave and expanded family and medical leave.

Question 90: *If I am employed by a temporary placement agency that has over 500 employees and am placed at a second business that has fewer than 500 employees, how does the leave requirement work? Are one or both entities required to provide me leave?*

Answer: *The temporary staffing agency is not required by the FFRCA to provide you (or any of its other employees) with paid sick leave or expanded family and medical leave because it has more than 500 employees. In contrast, the second business where you are placed will generally be required to provide its employees with paid sick leave or expanded family and medical leave because it has fewer than 500 employees (see [Question 39](#)).*

Whether that second business must provide you with paid sick leave or expanded family and medical leave depends on whether it is your [joint employer](#). If the second business directly or indirectly exercises significant control over the terms and conditions of your work, then it is your joint employer and must provide you with paid sick leave or expanded family and medical leave. If the second business does not directly or indirectly exercise such control, then it is not your employer and so is not required to provide you with such leave. To determine whether the second employer exercises such control, the Department of Labor would consider whether it exercises the power to hire or fire you, supervises and controls your schedule or conditions of employment, determines your rate and method of pay, and maintains your employment records. The weight given to each factor depends on how it does or does not suggest control in a particular case.

If the second business provides you with paid sick leave as your joint employer, the temporary staffing agency is prohibited from discharging, disciplining, or discriminating against you for taking such leave, even though it is not required to provide you with paid sick leave. Similarly, if the second business provides you with expanded family and medical leave as your joint employer, the temporary staffing agency is prohibited from interfering with your ability to take leave and from retaliating against you for taking such leave, even though it is not required to provide you with expanded family and medical leave.

Question 91: My employees have been teleworking productively since mid-March without any issues. Now, several employees claim they need to take paid sick leave and expanded family and medical leave to care for their children, whose school is closed because of COVID-19, even though these employees have been teleworking with their children at home for four weeks. Can I ask my employees why they are now unable to work or if they have pursued alternative child care arrangements?

Answer: You may require that the employee provide the qualifying reason he or she is taking leave, and submit an oral or written statement that the employee is unable to work because of this reason, and provide other documentation outlined in section 826.100 of the Department's rule applying the FFCRA. While you may ask the employee to note any changed circumstances in his or her statement as part of explaining why the employee is unable to work, you should exercise caution in doing so, lest it increase the likelihood that any decision denying leave based on that information is a prohibited act. The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason. For example, your employee may not have been able to care effectively for the children while teleworking or, perhaps, your employee may have made the decision to take paid sick leave or expanded family and medical leave to care for the children so that the employee's spouse, who is not eligible for any type of paid leave, could work or telework. These (and other) reasons are legitimate and do not afford a basis for denying paid sick leave or expanded family and medical leave to care for a child whose school is closed for a COVID-19 related reason.

This does not prohibit you from disciplining an employee who unlawfully takes paid sick leave or expanded family and medical leave based on misrepresentations, including, for example, to care for the employee's children when the employee, in fact, has no children and is not taking care of a child.

Question 92: My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?

Answer: In order for your employee to take leave under the FFCRA, you may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. You may not, however, require the employee to provide

further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms. The minimal documentation required to take this leave is intentional so that employees with COVID-19 symptoms may take leave and slow the spread of COVID-19.

Please note, however, that if an employee were to take unpaid leave under the FMLA, the FMLA's [documentation requirements](#) are different and apply. Further, if the employee is concurrently taking another type of paid leave, any documentation requirements relevant to that leave still apply.

Question 93: I took paid sick leave and am now taking expanded family and medical leave to care for my children whose school is closed for a COVID-19 related reason. After completing distance learning, the children's school closed for summer vacation. May I take paid sick leave or expanded family and medical leave to care for my children because their school is closed for summer vacation?

Answer: *No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or childcare provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his or her child's care provider during the summer—a camp or other programs in which the employee's child is enrolled—is closed or unavailable for a COVID-19 related reason.*

6. Latest on Re-Opening the Economy

With state and local governments gearing back up to re-open the economy, many employers are seeking answers to the challenging issues they will face as they resume their business operations amidst COVID-19.

ReedSmith Law Firm: New York announces additional re-opening guidance, including a regional monitoring dashboard.

To read the full report, go to:

https://www.employmentlawwatch.com/2020/05/articles/employment-us/new-york-announces-additional-reopening-guidance-including-a-regional-monitoring-dashboard/?utm_source=Reed+Smith+-+Employment+Law+Watch&utm_campaign=b8a5235885-

[RSS EMAIL CAMPAIGN&utm_medium=email&utm_term=0_b40554bd20-b8a5235885-78816497](https://www.statesideassociates.com/newsletter/RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_b40554bd20-b8a5235885-78816497)

Stateside Associates publishes a daily report about State and Local Government responses to the evolving situation. Some of the new developments in today's report include:

- **Delaware** Governor John Carney (D) announced his administration is working with Maryland to coordinate re-opening efforts.
- **Mississippi** Governor Tate Reeves (R) has ordered the one week waiting period for unemployment benefits waived for all claims filed March 8 through December 26, 2020.
- The Western States Pact has urgently requested \$1 trillion in relief from the federal government for state and local governments.

We are also providing a link to a spreadsheet that includes state and local COVID-19 response information provided by **MultiState Associates**.

To view their spreadsheet, go to:

https://docs.google.com/spreadsheets/d/e/2PACX-1vRIJWZJ7OkGUW57_rdA2n3xBJ3qjW6u4Z9N6K9Y5L4bM_6H7-S308qdKmJfpVstYWf300nyujvZPFSy/pubhtml?urp=gmail_link

May 28 NAW Webinar on Economic Outlook:

We are partnering with NAW senior economic advisor Alan Beaulieu to produce a second critical economic forecast webinar. This webinar, "Distribution Post COVID-19 Outlook," will run Thursday, May 28, from 3:00 to 4:30 PM EDT. Seats are limited, so if you are interested, please purchase your seat today at:

www.naw.org/distribution-post-covid-19

[Click here](#) for links to Critical Updates sent previously.

Many thanks—

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National Association of Wholesaler-Distributors

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