

An illustration of a diverse crowd of people, all wearing face masks. The people are rendered in various colors and styles, representing different ethnicities and ages. The background is a solid dark blue. The text is overlaid on the left side of the image.

CRISIS MANAGEMENT FOR COVID-19

Week 9: PPP, Healthy at Work & Legal Updates

*Presented by:
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INTRODUCTIONS



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PPP Questions Answered

SBA and Treasury Issue Substantial PPP Guidance

- After weeks of concerns over lender differentiation, confusing and conflicting guidance from the SBA, US Treasury, and threats of “audits” and “criminal sanctions” against employers who sought loans and are deemed not to have a “business necessity” for the loans, the US Treasury and Small Business Administration answered most, but not all, hanging questions in two ***HUGE*** updates
- Recap:
 - Substantial questions exist with regard to “good faith” applications
 - Comparison of the 8 weeks to the “last fully completed quarter” led to a 9.75 vs. 8-week comparison
 - The PPP monies were required to be expended during the 8-week period – which started whenever you received the monies, whether a Wednesday, Saturday, Holiday, etc.
 - 75% required for “payroll,” but payroll was not well defined
 - Leases were undefined, raising concern among some as to vehicles and other leases (we advised that vehicles would be included in Week 3 Webinar due to definition in the underlying statute)

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PPP Questions Answered

SBA and Treasury Issue Substantial PPP Guidance

- On May 13, the U.S. Treasury and SBA issued 2 new guidance points on PPP Loans in its FAQ
 - “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 loan request in good faith”
 - Still rebuttable presumption -- Businesses should be careful that the certification is still accurate, but no audit or additional scrutiny will take place absent some additional basis
 - Affiliates will still need to verify total amounts do not exceed \$2MM
 - Those entities that fall above the \$2MM threshold have a target on their back
 - Documentation of every portion of the requirements will be critical!
 - Secondly, as I promised last week when no “guidance” had been posted, the “Amnesty Deadline” was extended, once again to May 18, 2020 (from May 7 and May 14, 2020)
 - Given the May 15, 2020 Update (next slide), I believe this will be extended to May 21, 2020)

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PPP Questions Answered

SBA and Treasury Issue PPP Calculation Guidance

On Friday evening (May 15, 2020), the SBA quietly posted new PPP Calculation Guidance on its website. US Treasury updated its website on the evening of May 16, 2020.

- Key take-aways from this HUGE Update:
 - The “incurred” and “paid” language in §1106 of the CARES Act regarding expenses that count for forgiveness is clarified to allow expenses paid and expenses incurred in the 8-week period
 - New guidance providing a borrower friendly interpretation of the calculation of both the FTE Employee and wage/salary reduction provisions that reduce the amount of debt forgiven
 - A ban on using bonuses to owner employees to fill shortfalls in eligible expenses used to apply for loan forgiveness buried in the representations;
 - Covered rent obligations include leases on both real and personal property
 - The creation of a new Alternative Payroll Covered Period that allows borrowers to align the 56-day period with their own payroll period.
 - Clarification of the 75% Calculation of Payroll (addressing the 9.75 week issue)

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PPP Calculation Guidance

Computing Payroll Costs and Forgiveness

- The Covered Period is the 8 weeks immediately following receipt, but also an “Alternative Payroll Covered Period” (Payroll Period) that allows for regular payroll processing
 - Generally, only payroll related items are allowed in the Payroll Period
 - Other expenses must fall within the Covered Period (56-day/8-week period)
- Borrowers will have to provide the following information, if seeking forgiveness:
 - Total eligible payroll costs ***incurred or paid*** during the Covered Period or the Payroll Period
 - The amount of pre-existing business mortgage interest payments during the Covered Period
 - The amount of pre-existing business personal or real property Covered Period lease payments
 - The amount of pre-existing business utility payments during the Covered Period

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PPP Calculation Guidance

Eligible Payroll Costs

As reflected above, SBA has clarified and announced forgiveness for payroll paid **or** incurred during the Covered Period or the Payroll Period

- The subtle wording of the announcement has major implications. The CARES Act (§1106(b)) appears to refer to payroll costs being eligible for forgiveness based upon electing the incurred **and** paid by date.
- The SBA, however, has loosened its interpretation
 - Eligible costs paid during the period regardless of when they were incurred **and**
 - Eligible costs incurred during the period so long as they are paid by a standard payment date
 - The inclusion of this provision eliminates the need to schedule a special payroll to be paid on day 56 of the applicable covered period.
 - Borrowers can only count the expense once
- Owner bonuses are capped at the annualized \$100,000 rate (\$15,385 for 8-week period)

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PPP Calculation Guidance

Eligible Payroll Costs

- of the loan toward payroll, compared to the “last full quarter” (1st Quarter contains **13 weeks**; 75% = 9.75 weeks
 - Paying 9.75 weeks of pay in 8 weeks is currently impossible – still no clarification
- Still massive confusion on PPP. What we know:
 - Must certify that the loan was needed considering current activity, access to other sources of liquidity, and whether these other options would be significantly detrimental to the business
 - Borrowers will want to have documentation that shows they considered each factor
 - Subject to review (mandatory for more than \$2,000,000)
- Amnesty extended through May 14, 2020 for “additional guidance”
 - No additional guidance as of today’s date
- SBA Guidance is changing every single day. Document the dates when decisions are made, the then-current guidance, and the rationale for business-decisions related to the loan request

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PPP Calculation Guidance

Eligible Non-Payroll Costs

- An eligible nonpayroll cost must be paid or incurred during the Covered Period, even if billed after
 - The Alternative Payroll Period is not able to be utilized for non-payroll costs
- Eligible nonpayroll costs cannot exceed 25% of the total forgiveness amount
- The 75% payroll cost test applies ***only*** to the maximum forgiveness amounts, not to eligibility
 - Some lenders had utilized a 75% cliff rule, i.e., 75% for payroll or nothing forgiven
- of the loan toward payroll, compared to the “last full quarter” (1st Quarter contains ***13 weeks***; 75% = 9.75 weeks)

Questions
& Answers



2 Kentucky's Healthy@Work

Kentucky's Phase 1 Business Re-Opening Continues

On May 11, 2020, Governor Beshear issued a new Emergency Order allowing businesses to open as follows:


May 11, 2020:
Order

-  Construction
-  Horse Racing (No Fans)
-  Manufacturing & Distribution
-  Office-Based Businesses (50%)
-  Pet Grooming / Boarding
-  Photography
-  Vehicle or Vessel Dealerships



May 18, 2020:

-  Government Offices / Agencies







May 20, 2020:

-  Funeral and Memorial Services
-  Retail









May 22, 2020:

-  Restaurants: 33% Capacity + Outdoor Seating
-  Groups of 10 people or fewer

May 25, 2020:

-  Cosmetology Businesses
-  Hair Salons/Barbershops
-  Massage Therapy
-  Nail Salons
-  Tanning Salons
-  Tattoo Parlors

June 1, 2020:

-  Auto/Dirt Track Racing
-  Aquatic Centers
-  Bowling Alleys
-  Fishing Tournaments
-  Fitness Centers
-  Kentucky State Park Lodges
-  Movie Theaters
-  Salato Wildlife Education Center

2 Kentucky's Healthy@Work

Re-Opening is subject to strict mandates, pursuant to Governor's Order:

All entities in the Commonwealth of Kentucky shall comply with minimum requirements attached to, and fully adopted and incorporated by reference in this Order. The minimum requirements for all entities in the Commonwealth of Kentucky can be found at: <https://govstatus.egov.com/ky-healthy-at-work>.

In addition to the minimum requirements, entities shall implement and comply with any industry- or sector-specific requirements under any Cabinet Order. Those requirements can be found at <https://govstatus.egov.com/ky-healthy-at-work>.

If any entity cannot comply with the minimum requirements or the industry- or sector-specific requirements, they must wait to reopen until they are able to do so or until some or all of these requirements are lifted.

2 Kentucky's Healthy@Work

All Businesses must comply with the following:

- | | |
|--|---|
| <ul style="list-style-type: none">• Continue Telework if Possible• Phased Return to Work• Enforce Social Distance• Limit Face-to-Face• Universal Masks and PPE• Adequate Hand Sanitizer• Restrict Common Areas | <ul style="list-style-type: none">• Proper Sanitation• Conduct Daily Temperatures/Health Checks• Create a Testing Plan• Make Special Accommodations• Designate a “Healthy at Work Officer• Educate and Train Employees• Contact Notification Responsibilities |
|--|---|

Most questions deal with two issues:

- “Healthy at Work Officer”
 - Who? What? How?
- Conducting Daily Temperatures/Health Checks
 - At work, at home, or both? What is a “health check”?

All Businesses must comply with the following:

“Healthy at Work Officer”

- Responsible for the entity’s compliance with all governmental mandates/guidance
- No other guidance provided by the directives for training/position/liability
- Typically, HR provides identification of qualified personnel, but we need guidance

Conducting Daily Temperatures/Health Checks/“Testing Plan”

- Employers Must Assure Daily Temperature and Health Checks
 - Either Self-Administered or by the Employer prior to workplace entry
- Direct all employees with a fever, or symptoms to PCP for testing
 - Assure symptomatic employees are tested within 36 hours
 - Train employees on how to isolate individuals with suspected COVID-19
 - Have a proper plan in place for reporting possible cases

2 Kentucky's Healthy@Work

All Businesses must comply with the following:

- Continue Telework if Possible
- Phased Return to Work
- Enforce Social Distance
- Limit Face-to-Face
- Universal Masks and PPE
- Adequate Hand Sanitizer/Sanitation
- Restrict Common Areas
- Conduct Daily Temperatures

2 EEOC Update

Ongoing updates – and corrections

- Employees with “high risk” conditions may ask employers about reasonable accommodations (ADA)
- Employer may not exclude or take any adverse action merely because of CDC-identified disability
 - Employer may exclude the employee only if a “direct threat” -- that the employee has a disability that poses a “significant risk of substantial harm” to his or her own health.
 - Consideration of the severity of the COVID-19 outbreak in a particular area; the employee’s own health, and the Employer’s workplace (and measures taken)
 - Employer still cannot exclude the employee or take adverse action unless there is no reasonable accommodation, absent undue hardship, that the employer can make – telework; leave; reassignment; protective equipment; separation barriers; elimination or substitution of functions; temporary schedule modifications.
- The employee must notify the employer of need for accommodation
- CDC guidance documents references “vulnerable workers” (defined to include individuals over age 65 and those with underlying medical conditions) and suggests that employers provide duties that minimize their contact with customers and other employees “if agreed to by the worker.”

2 EIDL Guidance

SBA Announces Limitations of new EIDL Grants solely to agricultural businesses

- As previously referenced, EIDL received additional funding in COVID-19 Phase 3.5
- At this time, only agricultural business applications will be accepted
- Applicants who have already submitted their applications will continue to be processed on a first-come, first-served basis.
- For agricultural businesses that submitted an EIDL application through the streamlined application portal prior to the legislative change, SBA will process applications without the need for re-applying.
- Agricultural businesses includes those businesses engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries
- SBA is encouraging all eligible agricultural businesses with 500 or fewer employees wishing to apply to begin preparing their business financial information needed for their application.

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Practical Advice for Employers

What employers need to explain to employees

Q: Is it sufficient to have each employee self-verify, and call in if their temperature is 100.4° or above?

A: No. The Governor has identified additional guidance is necessary – and liability concerns exist

Q: UI office has provided wildly inconsistent guidance about reducing hours what benefits will be received. What should we do?

A: Prepare an application, in letter form, and send to the Executive Director. Do not wait for an application form

Q: Is there a maximum amount that an employee can make under Kentucky's Workshare?

A: No. Despite inconsistent guidance, there is no cap in the actual regulations (no \$552 per week)

Q: On Monday's call it was mentioned there would be a new handbook with updates to workshare and details on the new workshare program that is still pending DOL approval. Where can I find these?

A: No clue! Promised to be sent by end of the day last Monday. Have I mentioned, KUIC is broken?!

Questions
& Answers



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