

COVID-19: HR Issues that employers need to know Frequently Asked Questions

Thank you for attending COVID-19: HR issues that employers need to know right now, presented by Herbein + Company, Inc. (Herbein) and Mosteller and Associates on Friday, Apr. 17.

While our professionals addressed a number of issues during the live event, time constraints meant we were unable to answer all inquiries. We are now pleased to provide a frequently asked questions (FAQ) document that addresses these questions. [You can also access a recording of the webinar, presentation PDF and presenter information here.](#)

Herbein and Mosteller and Associates are committed to helping you adapt to an evolving business landscape. Your health and safety are our shared priority – with relevant, up-to-date information, we'll help you navigate through and be resilient in the face of this new normal.

1. Is there any guidance about Holiday Pay and accruing vacation time while on paid sick leave or emergency FMLA?

Holiday and PTO policies generally define rules governing Holiday Pay or Vacation/PTO accruals while on Leave. Absent direction from internal policy, we recommend erring in favor of the employee and either paying the holiday and/or allowing vacation time or PTO to accrue during paid sick leave or emergency FMLA.

2. Can employees who are working for a life essential company that has plenty of work, receive unemployment for a voluntary layoff due to being concern about COVID?

If an employer has work available and offers it to the employee and they refuse the work, they are not eligible for unemployment. The unemployment office has a form, UC-1921 that can be submitted by the employer in this situation.

3. Does anyone know how we will need to prove a discretionary profit-sharing contribution expense for forgiveness when that amount is not paid until 2021?

The language in the CARES Act seems to look at all payroll expenses on a “cash basis”. The expenses must be “incurred and paid” in the 8 week period to be counted as payroll costs.

4. Also, when we are able to reopen, if employees decide to refuse work (not for a covered reason under the FFCRA) but because they are scared, will their UC be denied?

If an employer has work available and offers it to the employee and they refuse the work, they are not eligible for unemployment. The unemployment office has a form, UC-1921 that can be submitted by the employer in this situation.

5. Most of our employees are part-time hourly and are making substantially more by being on unemployment with the \$600 supplement - realizing that only lasts until July, we are concerned they will refuse to come back onto payroll now that we have the PPP funds. We advised when they were laid off that it was temporary, and that our intent was to bring them back ASAP. However, our facilities and programs remain closed, so we are essentially going to bring them back to pay them to stay at home - can they refuse?

If an employer makes a job offer to the employee and they refuse the work, they are not eligible for unemployment. The unemployment office has a form, UC-1921 that can be submitted by the employer in this situation. Alternatively, if the employees are doing better on unemployment, you are not required to spend the PPP funds. What you do not spend can be returned as a prepayment. What you do spend on eligible expenses will be eligible for forgiveness, dollar for dollar. However, the forgiveness is subject to various reduction calculations. The amount of any calculated reductions can be eliminated if your FTE count and any wage reductions are restored by "6/30/20"(as of today). Evaluate the costs and benefits of forcing everyone to drop unemployment so the employer can use up the PPP proceeds vs. allowing employees to stay on unemployment and return unused loan proceeds and risk some reduction in forgiveness.

6. Do you have suggestions for essential businesses who may have employees who choose not to report for work due to non-health related issues (ex: being "scared" to come to work)?

If an employer has work available and offers it to the employee and they refuse the work, they are not eligible for unemployment. The unemployment office has a form, UC-1921 that can be submitted by the employer in this situation.

7. Are healthcare workers exempt from FFCRA?

An employer *may* exclude employees who are healthcare providers or emergency responders. The term healthcare provider includes anyone employed at any Doctor's office, post-secondary educational institution offering healthcare instruction, medical school, health agency, or nursing facility. It does NOT include those that provide services to the health care industry.

8. A lot is being said about employers that have laid off, furlough or reduced wages. What about those that are non-essential but have and intend to continue paying all staff and providing benefits as usual.

That is and admirable stance. The PPP loan would allow such an organization to receive full forgiveness. If the organization is over 500 or did not obtain a PPP loan, the use of EIDL funds or the retention credits should be considered.

9. If we receive PPP, how many employees need to keep on staff? In July 19, reduced number of W2s but my avg # is > current staff level. ALSO, some may not want to come back because they receive more from unemployment. If don't come back, can I hire others to replace?

When your 8-week loan is originated, your average headcount will be calculated during the 8-week period. One of the factors determining forgiveness is your headcount from a base period. The base period, chosen by the employer, can be either (1) The average headcount from 2/15/19 through 6/30/19 or (2) 1/1/20 through 2/29/20. In the example shared, you will likely look at the 2nd option since the headcount in the first option was prior to your July '19 reduction.

When doing the FTE analysis, specific names are not required, so replacement workers may be utilized to meet the FTE requirements.

10. Since companies receiving the PPP loan are not eligible for tax credits/deferrals under FFCRA - 1. Should the employer still pay PSL/EMFLA at the federal limits? If yes, how are other employers handling "docking" the pay for salaried exempt?

An employer with a PPP loan is still required to pay PSL/EMFLA at the federal limits. Under the FLSA . For exempt employees. The salary in a week when PSL/EMFLA is taken, the exempt salary may be prorated based on the amount of hours worked. So, a FT exempt person who normally works 40 hours only works 24, their salary would be prorated (24/40). The additional 16 hours would be paid under EPL/EMFLA. If EMFLA is being taken as unpaid (1st 10 days) and paid leave such as EPL or PTO is not applied, the exempt wages paid would only be the prorated portion. Such reductions in exempt pay are permitted under FMLA and we assume that extends to EPL and EMFLA.

11. What if you are under a PEO and do not file a 941? Can you still file for the Tax credit?

Third-party payers include professional employer organizations (PEO), certified professional employer organizations (CPEO) and agents as defined under section 3504. An Eligible Employer (also known as the common law employer) who is otherwise eligible to receive the credits, is entitled to the credits regardless of whether it uses a third-party payer to report and pay its federal employment taxes. The third party payer is not entitled to the credits with respect to the qualified sick leave and qualified family leave wages it remits on behalf of an Eligible Employer, regardless of whether the third-party payer is considered an 'employer' or 'co-employer' for other purposes of the Internal Revenue Code.

12. What if I am a parent with a payment plus loan, can I still get the deferral?

Loans that are federal and federally held by the federal government, including direct Parent PLUS loans, have automatic forbearance until September 30th. Applies to loans taken since 2010. The payment pause applies to Federal Parent PLUS Loans, Stafford Loans, Federal Grad PLUS Loans, and Federal Consolidation Loans. Perkins Loans, certain FFELP loans, and Private Student/Parent loans are not eligible.

13. We have a 10-employee business. Two officers making 100k and two spouses on payroll. Is unemployment for all 10 employees better and take employee Retention Tax Credit year end preferable to PPP loan?

The PPP loan works best if you can obtain full forgiveness for the loan. This is accomplished by maintaining your FTE count similar to period tested pre-pandemic and spend at least 75% of the proceeds for payroll costs. If you believe you will not be able to receive full forgiveness, you should evaluate whether the credits provide greater benefit than the PPP Loan.

