

NEW YORK CITY HOSPITALITY UPDATE:

STATE OF THE INDUSTRY & LOOKING FORWARD

APRIL 29, 2020

YOU ASKED, WE ANSWERED

1. **Question:** Is there a penalty if you have to terminate employees after the eight-week PPP period?

Answer: Currently, there is no penalty for terminating an employee after the eight-week PPP period expires or June 30th, whichever is later. However, you do need to watch for further guidance on this. The SBA has stated that it will issue an interim final rule which should more definitively answer this question.

2. **Question:** Are you hearing anything about how managing employees under a reduced capacity might conflict with existing regulation around scheduling, such as notifications and how far in advance restaurants have to provide schedules?

Answer: The scheduling regulations under NYC Fair Workweek Law remain in place for both fast food establishments and retail stores. Therefore, employers covered by the NYC Fair Workweek law must comply with its parameters and regulations.

3. **Question:** If an employer would like to ensure that returning employees are legally authorized to continue working in the US, would you recommend conducting an I-9 audit during this time of closure before deciding who returns?

Answer: You should consult with legal counsel on how best to address this in your workplace, as there are a number of legal concerns with both immigration and anti-discrimination.

4. **Question:** We will not have a true reading on who can return until months after we reopen. How would you suggest handling the WARN regulations if we truly do not know if we can re-employ people?

Answer: If an employer rehires workers now as a result of a PPP loan and it is possible that the employer will terminate such workers' employment at the end of the eight-



week PPP period, then the employer—to the extent meeting the WARN thresholds—should send out WARN notices at the time of rehire. In all other cases, if the employer truly does not know if and when it will close, the employer should send notices as soon as practicable after a decision is made to close or layoff employees.

5. **Question:** **Do we believe the 75/25% ratio may be adjusted in NYC? How do you handle the employees who are making more money collecting unemployment benefits?**

Answer: Unfortunately, there is no way to know if Congress will change the ratio; we are hopeful but not optimistic. With respect to employees that do not want to return to work because they are making more money collecting unemployment, if they turn down the opportunity to return to work, they likely will not remain eligible for unemployment benefits. Indeed, if an employer makes an offer to return to work and the individual (whether originally terminated, laid off or furloughed) refuses to return, they are likely no longer eligible for unemployment benefits. Each state has a different process for reporting eligibility, but State Departments of Labor usually catch up to individuals who lose eligibility. Speak to legal counsel concerning appropriate offer letters in these circumstances.

6. **Question:** **Can the PPP loan proceeds be used against union severance, benefits etc. and still be considered a forgiven loan?**

Answer: Yes, although probably only if paid within the eight-week period. The SBA has stated that it will issue an interim final rule which should answer when the payments need to be made and with more specificity as to the type of payments which qualify.

7. **Question:** **In terms of forgiveness, are health insurance benefits included in the 75% of payroll needed to be spent for PPP forgiveness?**

Answer: Yes.

8. **Question:** **How can you check on the status of a PPP loan?**

Answer: Unfortunately, each financial institution sets its own policies and procedures, so we suggest reaching out directly to the institution that you applied through.

9. **Question:** **For the interest on the PPP loan, does the 1% start accruing on the date you get the loan, or July 1? Even though it is deferred for six months.**



Answer: The interest rate begins to accrue on the date the loan is received and the deferral starts from that date as well.

10. Question: **For employees making more than \$100,000, isn't the forgiveness stopped on the excess of \$100,000? Or to state it another way, are salaried employees who earn over \$100,000 not counted for forgiveness or is it the amount over \$100,000?**

Answer: Yes. The current guidance appears to indicate that only salary in excess of \$100,000 is excluded from forgiveness and the first \$100,000 is forgiven. However, the SBA has stated that it will issue an interim final rule that should more definitively answer this question. Employers who want to be conservative and maximize the potential for all of the loan to be forgiven should consider paying no one employee at an annualized rate over \$100,000 during the eight-week period.

11. Question: **What if you spend 75% of the PPP on payroll but have only brought back 20% of the staff?**

Answer: This will impact the amount of the loan forgiveness, probably significantly. Based on the current guidance the amount of the loan forgiveness is also dependent on the following ration: (i) the average number of full-time equivalent employees per month employed by the eligible recipient during the covered period (the eight weeks after the PPP loan is issued) divided by (ii) the average number of full time equivalent employees per month employed by the eligible recipient during the period beginning on March 1, 2019 and ending on June 30, 2019. However, the SBA has stated that it will issue an interim final rule which should help answer this question.

12. Question: **What if we re-hire 100% of the employees, but business does not warrant staying open after eight weeks, do we need to fire everyone again?**

Answer: No matter how many employees are recalled or rehired, there is a risk that employees will have to be laid off, terminated or furloughed again at the end of the eight-week period if there is no work/pay available. As discussed at the webinar, WARN notices may be required and discussions with counsel should be had prior to recall.



13. Question: **Can PPP be used for health insurance?**

Answer: Yes.

14. Question: **Partners paid through a K-1 are paid that way based on IRS guidelines, so why would they be excluded in the payroll piece here?**

Answer: Partner compensation (even when partners are paid through a K-1) is included as payroll compensation for purposes of loan forgiveness, but partner compensation is also subject to the \$100,000 threshold noted above for employee compensation.

15. Question: **Steven stated that previous W2 owners can go on payroll, however PPP guidance has stated that 1099 "employees" and or guaranteed payments for owners could be used as part of the basis for the loan application if it can be a basis for the loan amount.**

Answer: *Partner* compensation is included as part of payroll. *Independent contractor* compensation is not. The SBA has stated that it will issue an interim final rule to provide further guidance on PPP loan forgiveness which should more definitively answer this question.

16. Question: **If I'm not looking for (full) loan forgiveness, can I use funds, after the eight-week period, for purposes other than payroll, rent or utilities? Does it simply convert into a two-year loan?**

Answer: The SBA has stated that it will issue an interim final rule which should answer this question.

17. Question: **What if the "employee" also has 10% ownership stake, so they get a K1, but work as the general manager? They get a draw as well as another partner. Their income goes through payroll and was used in the PPP calculations.**

Answer: The SBA has stated that it will issue an interim final rule which should more definitively answer this question as to the amount of partner compensation usable toward loan forgiveness.

18. Question: **If a partner in a restaurant that is not an employee (they're a "working member" who receives management fees to their single member LLC reported as**



self-employment income) – are they eligible for PPP either as self-employed or on the business itself?

Answer: Such an individual should be eligible, probably as self-employed. As of this writing, there is still considerable money in the SBA “kitty.”

19. **Question: If 30% of the PPP loan is spent on rent/utilities during the eight-week period, does an employer get loan forgiveness for the 70% spent on payroll, or does none of it count?**

Answer: We anticipate that there will be loan forgiveness but probably not at the full 70%. The SBA has stated that it will issue an interim final rule which should answer this question.

20. **Question: I have received the EIDL \$10,000 grant. However, I have not heard back on the larger loan. From experience, what is the time frame to hear on the next steps to receive and move forward on the loan?**

Answer: Unfortunately, we do not know what the time frames will be; we are all swimming in uncharted waters.

21. **Question: Can you clarify whether FICA and federal tax withheld is forgivable under the PPP?**

Answer: FICA and other payroll taxes withheld from an employee’s pay do not count as payroll expenses and are not part of the forgiveness calculation.

22. **Question: If your partners apply for a PPP loan without your permission, who is responsible to pay it back?**

Answer: If a partner’s consent is required for the loan, then borrowing without consent runs afoul of the underlying organizational documents. If partner’s consent is not required, then whomever made the decision to borrow on behalf of the company should have authority to make that decision. If they do and borrowed in good faith, since there are no personal guarantees, the company would be liable. However, there is always a chance that the borrowing was not in good faith or not in compliance with the SBA rules and regulations, and general partners may be exposed to liability in the event of a claim. Generally, all general partners could be responsible for actions taken



on behalf of a partnership. This is very fact dependent and you should speak with counsel.

23. **Question:** **Because the laws are not clear, how will they hold peoples feet to the fire? Is it enforceable?**

Answer: It is unclear how the government will hold companies that accepted PPP loans accountable. The SBA and/or the Treasury Department may issue guidelines or regulations addressing this issue or they could do an audit of those entities that took PPP loan, but at this time, it is uncertain.

24. **Question:** **For tipped employees, do we have to consider only the hours paid by the house or tips, for applying to the PPP loan and to apply for forgiveness?**

Answer: The total amount of reported and paid compensation (including tip income) is considered both for the application and loan forgiveness.

25. **Question:** **Can you pay the max PPP salary to someone in one shot and then terminate them?**

Answer: The SBA has stated that it will issue an interim final rule which should answer this question. Unfortunately, the answer is unknown at this time, but it is worth noting that employee headcount is important in ultimately computing the amount of the loan forgiveness.

26. **Question:** **Should we be making COVID specific addendums to handbooks? Any other addendums?**

Answer: Employee handbooks should be reviewed in full before re-opening as the law has changed in a number of areas, including leaves of absence. With respect to COVID, there may be a need to add new policies based on specific business decisions (e.g. employee testing). In addition, separate acknowledgements are likely necessary if an employer will be doing any lawful "pre-screenings."

27. **Question:** **If we are onboarding electronically, are we allowing electronic signatures?**



Answer: Yes, New York permits electronic signatures and such signatures have the same weight as “wet” signatures. Further, I-9s may also be completed electronically under certain conditions and parameters for which you should consult with counsel.

28. **Question: If a business is closed but puts people back on payroll (re-hired) do we need to do section 3 of the I-9? What if after eight weeks the employees have to go back on unemployment?**

Answer: If an employer rehires employees who were previously terminated or who were laid off for an extended period, the employer should have the employee complete a new I-9 or complete section 3 of the I-9 (an employer should consult with counsel as to what is most appropriate for their circumstances). The I-9 requirement is applicable even if the employee works only a few days, a few weeks, or a few months. If, on the other hand, the employee was furloughed (i.e., put on an unpaid leave of absence) for a short period of time, the employer may not have an obligation to complete a new I-9 or Section 3 of the I-9, therefore, in such a situation, the employer should consult with counsel to determine the most prudent course of action.

29. **Question: Can you provide all the onboarding forms electronically (i.e., notice of rights under sick leave, employee handbook sexual harassment policy, etc.). Is it fine if we have them sign one acknowledgment form in person for receipt of these individual forms?**

Answer: Under New York law, the employer may provide all on-boarding documents electronically. However, each document that must be signed should be signed individually (whether electronically or by wet signature – either is acceptable). The employer cannot have a general employee electronic sign-off for all of the new hire documents.

30. **Question: There has to be criteria for who gets to come back or not. We can't bring them all back. Can we use write-ups/disciplinary forms as a reason?**

Answer: Deciding who to recall should be based on objective, non-discriminatory factors. Ideally, if performance was an issue it would have been dealt with before the shutdown. Prior disciplinary warnings certainly could be used as a factor but seniority and specific job skills are less subjective.

31. **Question: Do we have to reinstate the accrued vacation or PTO time when bringing back employees?**



Answer: With respect to PTO time, which we assume is provided in order to comply with the NYC Earned Safe & Sick Leave Act, unless all accrued time was paid out upon separation of employment, then such accrued time must be reinstated if the employee is rehired (or recalled) within six months. The answer with respect to vacation time differs depending on how the employees were let go. If the employees were terminated and are being rehired, then there is no requirement to reinstate any accrued vacation time. However, if the employees were furloughed (i.e., placed on an unpaid leave of absence), then there has not been a separation of employment and accrued vacation time should be reinstated, although the employer can institute new rules about when such vacation time can be taken by recently recalled employees.

32. Question: **What about having customers sign waivers or attesting to their health?**

Answer: Guests can certainly be asked to sign an acknowledgement as to their current health. Utilizing a waiver may be possible for guests as well, but may not be enforceable. Prospective waivers cannot be used with employees. Generally, an employer also has the right to refuse entry or service to anyone—so long as it is on a non-discriminatory basis. Speak to legal counsel in order to best balance safety, privacy rights and discrimination concerns.

33. Question: **I may have missed this part, but does the reinstatement of the PTO bank apply to both terminated and furloughed employees?**

Answer: If the PTO time is provided to employees as part of the employer's compliance with NYC Earned Safe & Sick Leave Act, unless all accrued time was paid out upon separation of employment, then such accrued time must be reinstated if the employee is rehired within six months.

34. Question: **Can you put a moratorium on employees taking PTO days for six months and update the handbook to state such?**

Answer: If you provide PTO days and such days include NYC Earned Safe & Sick Leave Act and vacation time, then you cannot put a moratorium on an employee taking PTO time for a reason covered by New York City Earned Safe & Sick Leave Act, but you could put a moratorium for all other purposes (e.g., vacation). In other words, the employer could prevent the employee from taking vacation time, but not from taking sick leave (provided the employee has accrued leave in their bank).



35. Question: **Suggestions or thoughts on temperature checks at work?**

Answer: As was covered during the webinar, temperature checks are possible for guests and employees so long as they follow the proper law, guidelines and control for privacy and anti-discrimination concerns. Please speak to legal counsel before starting such a program.

36. Question: **So "anxiety" is a disability that we have to consider if someone is scared to come to work - or did I hear that incorrectly?**

Answer: Diagnosed "anxiety" is a disability under federal, state, and local anti-discrimination law. As such, reasonable accommodations must be provided to individuals who suffer from diagnosed anxiety. If an individual is scared to come to work, that in and of itself, is not sufficient to be deemed a disability under the law. However, if someone is diagnosed with anxiety, and that diagnosis manifests itself where the individual is scared to travel, then the employer may have to provide such individual with a reasonable accommodation. For example, if the individual could do work from home, that may be a reasonable accommodation. On the other hand, if the individual cannot perform the job except at the employer's place of business, there may not be any accommodation available except an unpaid leave of absence. Nevertheless, the employer should consult with counsel should the employer have such a situation.

37. Question: **Carolyn stated WARN Act would still apply with rehiring, just to clarify, this is still limited to employers of 100+ employees? Also, confirming that individual units with the same DBA but different companies are considered "separate units" under WARN?**

Answer: The New York WARN Act applies to any employer with **50** or more employees. In determining whether an "employer" has 50 or more employees for New York WARN Act purposes, the law looks at the employer control group (i.e., all entities under common ownership and/or control). If, when aggregated, all such entities have 50 or more employees, each entity is an "employer" for New York WARN Act purposes. However, simply because an entity is covered by New York WARN does not mean that the statute will be triggered with every employment loss. For New York WARN to be triggered there must be an employment loss (i.e., layoff, furlough, establishment closure, or significant reduction of hours) of at least 25 full-time employees at any one location. Therefore, if a small business with only 23 employees closes, New York WARN



would not be triggered even if the small restaurant is one of 30 other restaurants within the same restaurant group or under the same trade name.

38. **Question:** **Our WARN notices indicated a lay off for about two months. If we go beyond that time, do we have to issue new WARN notices?**

Answer: WARN notices must contain very specific information in order to comply with the New York WARN Act. If you indicated that the layoff would be for two months but did not include all the language necessary to comply with the New York WARN Act, you should consult with counsel on how to address the situation. If the original notices did comply with the New York WARN Act, then you do not need to send new notices, but you should send updates to the impacted individuals to inform them that their layoff has been extended.

39. **Question:** **You stated that the temperature threshold is 100.4. Is that a standard set by the government for sending someone home?**

Answer: The 100.4 temperature threshold has been established by the CDC and is subject to change.

40. **Question:** **What must we ask employees to provide us when they return to work after testing positive? Do they need to test negative?**

Answer: The New York City Human Rights Commission has stated that it would be a violation of New York City law to require employees who suffered from COVID-19 to provide a fitness for duty letter, a letter from a health care provider that they tested negative, or any other documentation before they return to work. However, you can prohibit an employee who has suffered from COVID-19 from re-entering the workplace until they are free of symptoms for at least 7 days, and their statement to that effect must be deemed sufficient. In addition, you could question every employee before they enter the workplace about whether they are suffering any COVID-19 symptoms and you can take the temperature of every employee every day to ensure that they do not have a fever.

41. **Question:** **Is there any information coming out that pertains specifically to bars reopening (locations that do not serve any food)? Are there going to be different opening rules/dates?**



Answer: We anticipate that the State and City will be issuing more detailed guidelines for hospitality, including nightlife.

42. Question: **Can we also ask employees to screen their own temperatures at home before they come to work?**

Answer: Yes; however, you will still need to comply with accommodation and leave laws.

43. Question: **If an employee comes to work with a fever and is sent home and has sick time, then we have to pay, but are you saying that if they don't have any accrued sick time we only have to pay three hours minimum?**

Answer: Whether an employee wants to use accrued New York City Paid Sick Leave, is up to them. However, as required by the NYS Hospitality Wage Order, an employee must be paid for a minimum of three hours of work if sent home by the employer.

44. Question: **Is there suggested language for asking an employee or guest to leave, just to use as a guideline?**

Answer: Best practices should be utilized for removing a guest. Physical contact should never be made; the request should be made by a manager and as privately as possible. To the extent possible, another managerial employee should serve as a witness and a timely incident report should be prepared.

45. Question: **How do you count number of employees for the sick leaves—is it at the time of the occurrence? Since employee numbers are now low and you may fall out of some of the laws.**

Answer: It depends on the law. For the new federal and state emergency COVID-19 sick leave laws, the number of employees is determine at the time the employee takes the leave. Therefore, it is possible that on day x, the employee is entitled to leave, but the next day, another employee is not entitled to the leave because the employer went over the 500 employee threshold.

46. Question: **Did Glenn say that the emergency NY Sick Leave run only consecutively and not concurrently?**



Answer: Yes, the NY emergency sick leave law runs consecutive to the federal emergency paid sick leave law and the NYC Earned Safe & Sick Leave Act. In fact, all three laws run consecutively, which can give employees under certain conditions up to five weeks of paid leave.

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