

COVID-19 Resources Webinar Series: Paycheck Protection Program Flexibility Act Update



Presented By
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June 2020



- ▼ Employment
- ▼ Employee Benefits
- ▼ Finance
- ▼ Tax
- ▼ Business Continuity /
Supply Chain /
Operations
- ▼ Contracts / Insurance
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Contractors
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CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



U.S. Supreme Court: Title VII Protects Sexual Orientation, Gender Identity & Transgender Status

- ▼ **Title VII of the Civil Rights Act of 1964** protects employees from discrimination on the basis of race, color, religion, sex and national origin
- ▼ **Circuit Courts of Appeal have been split** on whether Title VII's protection for "sex" discrimination extends to sexual orientation and transgender status
 - ▼ 6-3 Opinion Authored by Justice Gorsuch
 - ▼ **"If changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."**
 - ▼ Court's opinion said it refused to address how its holding affects sex-segregated bathrooms, locker rooms or dress codes
 - ▼ Most federal jurisdictions had operated under the assumption that Title VII would protect individuals on this basis, and many state or local laws already prohibited such discrimination

EEOC (Again) Updates its COVID-19 FAQs

- ▼ Last Thursday, June 11, EEOC issued **additional COVID-19 FAQs**
- ▼ **New ADA FAQ:** “Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?”
 - ▼ **Answer:** No.
 - ▼ Although the ADA prohibits discrimination based on **association with an individual with a disability, that protection is limited to disparate treatment or harassment**
 - ▼ ADA does not require an employer to **accommodate an employee without a disability based on the disability-related needs of a family member** or other person with whom the employee is associated

EEOC (Again) Updates its COVID-19 FAQs cont'd

▼ **New ADA, ADEA, PDA, and Title VII FAQs:** “...in advance of having ... employees return to the workplace, are there ways for an employer to **invite employees to request flexibility in work arrangements?**”

- ▼ Answer: Yes
- ▼ Employers may notify **all employees** of the options available to them to request accommodations in connection with the return to work
- ▼ That communication can rely on CDC guidance, including identifying a list of conditions that CDC has indicated pose a **heightened risk**
- ▼ Employers may not **unilaterally impose special rules** for individuals whom it believes to be at a heightened risk based on **health condition, age, or pregnancy**

EEOC (Again) Updates its COVID-19 FAQs cont'd

▼ **New ADA and Title VII FAQ:** “What should an employer do if an employee entering the worksite requests an alternative method of screening due to a medical condition?”

▼ **Answer:** The employer should consider what reasonable accommodations may be available to an employee where the reason for the request is based on a disability or religion.

EEOC (Again) Updates its COVID-19 FAQs cont'd

▼ **New Title VII FAQ:** “If an employer provides telework, modified schedules, or other benefits to employees with school-age children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?”

- ▼ **Answer:** Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics.
- ▼ For example, under Title VII, **female employees cannot be given more favorable treatment** than male employees because of a **gender-based assumption about who may have caretaking responsibilities**

EEOC (Again) Updates its COVID-19 FAQs cont'd

▼ **Additional Title VII Harassment FAQs** on:

- ▼ Employer's investigating and prohibiting harassment of **Asian Americans** prohibited under Title VII and related to COVID-19 employment issues
- ▼ An employer's obligation to investigate allegations of **workplace harassment** in connection with employees **working remotely** the same as they would if the employees were involved in those allegations at the place of work

The End of PCORI?? **Cancel That.**

- ▼ Patient-Centered Outcomes Research Institute (“PCORI”) Fees
 - ▼ Sponsors of self-insured health plans are required to report and pay PCORI fees on Form 720 by July 31 following the end of the plan year
 - ▼ PCORI fee for a plan year is equal to the average number of lives covered under the plan multiplied by an applicable dollar amount for the year (\$2.45 for plan years ending 9/30/2018 – 9/30/2019)
- ▼ **Are you done with PCORI?**
 - ▼ PCORI fees applicable for policy/plan years ending **AFTER** October 1, 2012 and **BEFORE** October 1, 2019

No more PCORI Fees	Still subject to PCORI Fee due in 2020
Calendar year plans and plans with a plan year ending in November or December	Plan years ending before October 1, 2019 – between January 1 and September 30, 2019
Final PCORI fee (for 2018 plan year) was due July 31, 2019	PCORI fee for the 2019 plan year due July 31, 2020

Extension of PCORI Fee

- ▼ **The Further Consolidated Appropriations Act, 2020 (Public Law 116-94) reinstated and extended the PCORI fee for 10 more years**
 - ▼ **PCORI fee does not expire now until the plan year ending after September 30, 2029**
 - ▼ **Because the PCORI fee is imposed under the ACA, the enforceability of the fee *may* depend on the outcome of the severability analysis in *Texas v. U.S.***

PCORI Fee Update

▼ Notice 2020-44

- ▼ Applicable dollar amount for policy years and plan years ending on or after October 1, 2019 and before October 1, 2020
 - ▼ New applicable dollar amount is **\$2.54**
- ▼ Transition Relief for calculating the average number of lives for policy years and plan years that end on or after October 1, 2019, and before October 1, 2020
 - ▼ Plan sponsors may continue to use methods from prior guidance: actual count method, the snapshot method, and the Form 5500 method (*See Treas. Reg. § 46.4376- 1(c)(2)(i)*)
 - ▼ For plan years ending on or after October 1, 2019, and before October 1, 2020, plan sponsors (and carriers) may use **any reasonable method** for calculating the average number of covered lives
 - ▼ If a plan sponsor uses a reasonable method under the transition relief, it must apply that method consistently for the duration of the plan year

Paycheck Protection Program: Flexibility and Forgiveness

PPP Timeline

- ▶ March 27 - Law Adopted
- ▶ April 3 - Applications Opened
- ▶ April 13 - 60% (\$250BB) Approved
- ▶ April 16 - 100% Approved and Allocated
- ▶ April 23 - FAQ 31 - Public Companies
- ▶ April 24 – 2nd Round:
 - ▶ \$310BB - PPP - \$60B Set-Aside
 - ▶ \$60BB - EIDL Increase (max amount reduced to \$150k)
 - ▶ Speculation that Funding Would Go Quickly But Did NOT HAPPEN

PPP Timeline (Cont'd)

- ▶ April 28 - FAQ 37 - Private Companies
- ▶ April 29 - FAQ 39 - \$2MM Audit
- ▶ May 5 - FAQ 43 - Extended Safe Harbor to May 14
- ▶ May 13 - FAQ 46 & 47
 - ▶ \$2MM Threshold
 - ▶ Safe Harbor Extended to May 18
- ▶ May 22 - Borrower Form of Application & Forgiveness Details
- ▶ June 5 - PPP Flexibility Act Made Law

Good Faith Certification

- ▶ Current Economic Uncertainty
- ▶ Necessary for Ongoing Operations
- ▶ Potential Impact of Other Sources of Liquidity

\$2,000,000 Threshold

- ▶ Audit Potential
- ▶ Good Faith Certification
 - ▶ Timing of Testing
 - ▶ Other Potential Ways to Enforce
- ▶ Impact of Other Companies Through Affiliation

Improvements Through Flexibility Act

- ▶ 24 Week Covered Period
- ▶ June 30, 2020 Becomes
 - ▶ End of 24 Week Period; or
 - ▶ December 31, 2020
- ▶ 75% Threshold for Payroll Costs REDUCED to 60%
- ▶ 5 Year Maturity
 - ▶ Existing Borrowers - May Need to Amend
- ▶ Addition of Employee Availability Concepts
- ▶ 10-Month Deadline to Apply for Forgiveness

Forgiveness Generally

- ▶ Forgivable Items
 - ▶ Payroll Costs (Apply PPP Methodology)
 - ▶ Interest on Covered Mortgage Obligations
 - ▶ Exclude Principal
 - ▶ Covered Utilities
 - ▶ Covered Rent Obligations
- ▶ Document and Retain Precise Records
 - ▶ Application Provides Guidance

Forgiveness Timing

- ▶ After Covered Period
- ▶ 60 Days from Application
 - ▶ Lender Decision - Good Faith Review in a Reasonable Time
 - ▶ Impact of Errors or Material Lack of Substantiation
 - ▶ Approval v. Denial v. Denial without Prejudice Due to Pending SBA Review
 - ▶ Lender Must Provide Reasons for Denial
 - ▶ Borrower may Request that SBA Review and Denial
- ▶ 90 Days for SBA Review
- ▶ 10-Month Deadline
- ▶ Payments Start

Forgivable Items - Payroll Costs

▶ Compensation:

- ▶ Salary, Wages, Commissions or Similar Compensation (including Bonuses)
- ▶ Furloughs, Hazard Pay Bonuses - permitted, subject to \$100k cap
- ▶ Potential Limitations on Owner-Employees

▶ Timing:

- ▶ Alternative Payroll Covered Period (1st day of First Payroll Period After Receipt of PPP Funds)
- ▶ Available if Payroll is Bi-Weekly or More Frequent

Forgivable Items - Nonpayroll Costs

- ▶ Timing: Eligible if:
 - ▶ Paid During the Covered Period; OR
 - ▶ Incurred during Covered Period AND Paid on or Before the Next Regular Billing Date
 - ▶ May Require Proration on the Back-End
- ▶ Interest on Covered Mortgage Obligations
 - ▶ Exclude Principal
 - ▶ Excludes Prepayments
- ▶ Covered Utilities
- ▶ Covered Rent Obligations

Impact of Hiring Decisions on Forgiveness

▶ Potential For Reduction

▶ FTE Headcount

- ▶ Exemptions: For Cause, Voluntary Resignation or Voluntary Reduction in Schedule. Must Document

▶ Compensation - Only applies if >25%

- ▶ Only if 2019 Compensation not more than \$100k in any period

▶ Not Double Penalized

▶ Safe Harbor Dates to Remember - February 15, 2020 and April 26, 2020

- ▶ If Restore FTE - Exempt From Reduction Calculations

▶ Full Time Equivalent - 40 hours/week



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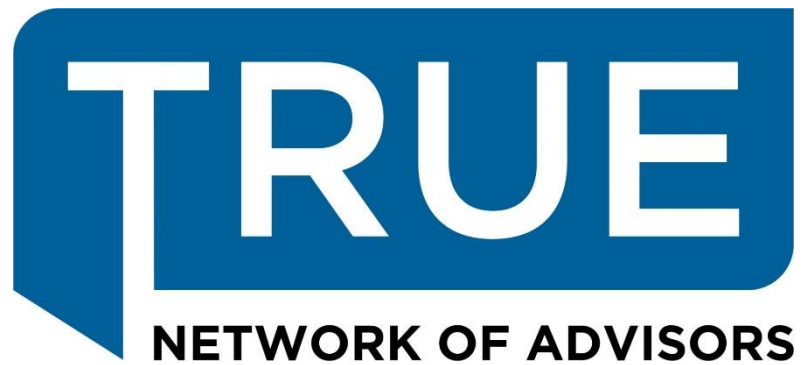


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