

Making Sense of COVID-19: What Small Business Owners Need to Know

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NJMEP Manufacturing Matters

Smart business owners are planning for when the regulations of quarantine will be relaxed and business operations will return. Forward-thinking companies should focus on three areas: 1) use of the loan proceeds under the CARES Act's Paycheck Protection Program (PPP); 2) safe return-to-work practices, and 3) preparing for COVID-19 related lawsuits. The first area requires legal and financial planning and understanding of the PPP. The second requires legal and workplace safety planning to meet CDC workplace safe distancing mandates. The last requires implementing corporate best practices and procedures to prepare now for a potential COVID-19 related lawsuit. This article discusses these topics generally, and the authors are happy to discuss your particular circumstances.

I. Payroll Protection Program

By now, you or your business may have qualified for and/or received the PPP loan proceeds. As a business owner, you are trying to maximize the benefits of this loan, especially forgiveness. Below is a list of general considerations to assist in navigating the forgiveness process:

- Proceeds are to be used within 8 weeks after receipt of the loan proceeds.
- In order to qualify for maximum forgiveness, businesses must use the loan for eligible expenses, including payroll (e.g., salary, wages, commissions or tips, employee benefits and taxes on compensation), rent payments, and utility payments.
- The entire amount of the PPP loan is eligible for forgiveness.
- Eligible payroll includes salary, wages, commissions and tips up to \$100,000 of annualized pay per employee (maximum of \$15,385 per individual for the 8 weeks).
- For self-employed individuals, most of the 2019 net profit would be attributed to net income; however such individuals are still limited by the \$15,385 maximum amount.
- Workforce reductions that occur between 2/15/20 and 4/26/20 will not reduce the forgiveness amount if restored by 6/30/20.
- Workforce reductions after 4/26/20 will not be included in the forgiveness analysis.
- Furloughed employees who decline to return to work can be replaced but must be paid at the same rate of pay.
- PPP loan proceeds should be kept in a separate account to provide accountability for the use of those proceeds if there is an SBA review.

Some employees may refuse to come back to work as they are making more money on unemployment. However, if the employer properly documents an employee's refusal to come back to work and has excess loan funds remaining, those funds may either be returned after the reconciliation is done with the lender or the remaining funds may be taken as a loan (subject to the 1% interest over 2 years and allowable use of funds). It is important that a written offer be provided to furloughed employees with a definite date for the employee to respond, with notice that failure to respond will be treated as a refusal to return to work. Employees need to know that refusal to return to work may be considered fraud by the Department of Labor and may disqualify that employee for current or future benefits.

II. Return-to-Work Practices

New Jersey hopefully will soon lift, or relax, Governor Murphy's Executive Orders and permit manufacturers to return their entire workforce to their factories and warehouses. Manufacturers need to prepare and enact safe return-to-work policies and procedures to protect their employees, including:

- Follow CDC guidelines relating to exposure, symptoms, and return to work, and consult workplace/OSHA experts to ensure compliance meets government minimum standards. This should include developing an Infectious Disease Preparedness and Response Plan.
- Practice worksite "safe-distancing": limit meetings, group "stand arounds" and toolbox meetings or conduct them remotely or at social-distancing distances,
- Provide Personal Protective Equipment ("PPE").
- Stagger work start/stop times, lunch breaks and port-a-john use.
- Practice healthy behavior: insist on proper handwashing, coughing, sneezing, and provide hand sanitizers and wipes.

These are just a few tips. Consult OSHA, [Guidance on Preparing Workplaces for COVID-19](#) for comprehensive coverage for these issues {Insert OSHA link}.

III. Lawsuit Preparation

Employers are at risk of being sued for employee's alleged exposure to COVID-19 at the manufacturing facilities, worksites, and in company vehicles. In April, a Wal-Mart employee's family sued the retail giant after the employee died of complications from the COVID-19 virus, claiming the company failed to implement COVID-19 safety precautions, sanitize the store, and provide personal protective equipment such as masks, latex gloves and even antibacterial soaps or wipes to employees. Future personal injury lawsuits against manufacturers will follow the allegations against Wal-Mart and allege personal injuries or wrongful death because of exposure and seek compensation for pain and suffering, hospital bills, missed time from work, fear of death, and lost wages. Other lawsuits will assert manufacturers violated federal and state wage and hour and family leave laws. Manufacturers should take proactive measures to prevent and prepare for these suits including:

- Draft and distribute to employees COVID-19 safe worksite practice policies ("best practices"). Use CDC and OSHA Guidelines and state and local government orders to draft these documents and have your employees consent to receiving them.
- Educate employees on COVID-19 best practices and document attendance at education meetings.
- Retain all attendance records and signed receipts of documents regarding best practices in each employee's file.

- For those employees who do not follow best practices, determine risk in retaining that employee and document their employee file.
- Conduct random spot checks of worksites to ensure compliance with “safe-distancing” practices and PPE requirements.
- Communicate daily to employees the need to follow and comply with the best practices by email or other written format.
- Understand all employment laws relating to unemployment, leave, and pay as they will mold your response to claims for leave and lost wages. Consult legal consultants to understand these complex laws.
- Maintain individual files on employees who self-quarantine without a prescription, those who take leave to care for a sick relative or for children studying remotely; Plaintiffs' lawyers might file class actions on behalf of a group of employees, and you will want to prove—with documents—how each employee is different.
- Prevent customers/vendors from entering your premises without a mask. Post these signs at all entrances and do not deviate from it.

Like any personal injury or wrongful death lawsuit, COVID-19 exposure lawsuits will be fact sensitive. Documentary evidence will be a key component to defending against COVID-19 related lawsuits. As a defendant, a manufacturer will have to prove it reviewed CDC, OSHA, and other safety guidelines, implemented safety protocols and developed best practices, and communicated them to employees. Remember to:

- Document all COVID-19 practices implemented, education meetings, spot checks, and other compliance efforts;
- Locate insurance policies and broker information. If you receive a Complaint, insurance carriers must be placed on notice immediately, and
- Retain all COVID-19 related documents to demonstrate compliance to local authorities and as proof in potential COVID-related personal injury and wrongful death suits.

The last months have been overwhelming on many levels. All must keep moving forward. For manufacturers, plan now for tomorrow. Understand the PPP and your obligations under the program. Consult financial consultants or lawyers to implement best practices and next steps in not only a financial reassessment but also a risk mitigation plan.