
MEMORANDUM

To: Board of Trustees
U.A. Union Local No. 290 Plumber, Steamfitter and Shipfitter Industry Health
and Welfare Trust

From: David S. Barlow
Nathaniel O. Parr

Date: April 13, 2020

Re: Paycheck Protection Program Loans and Maintenance of Employee Benefit
Contributions

The question presented is whether employers who take Paycheck Protection Program (“PPP”) loans to pay their employees must continue to make employee benefit contributions. For background, the PPP provides forgivable loans to small businesses to pay their employees during the COVID-19 pandemic. PPP loans will have a maturity of two years, a one percent interest rate, and loan repayments are deferred for the first six months. In general, PPP loans will be forgiven up to the full principal amount and any accrued interest so long as the loans are used for forgivable purposes and the employer maintains its employees and their compensation levels. Forgiveness will be incrementally decreased to the degree that the employer reduces his workforce or his employees’ compensation. Two distinct issues are (a) whether contributions are owed to the Trusts, and (b) whether employers must continue benefit contributions in order to obtain full PPP loan forgiveness.

When employees continue working: If an employer uses PPP loans to pay employees who are working, the applicable collective bargaining agreement or participation agreement still controls whether contributions are due. The PPP funds can be used to make payroll (including employee benefit contributions) but the loan terms do not amend or override the relevant bargaining agreement as to whether contributions are due on worked hours. There is nothing in Section 1102 of the CARES Act that would interfere with or supersede an employer’s existing obligations under labor law.

When employees are not working: If an employer uses PPP loans to maintain payroll for employees who are *not* working, there are several considerations. With regard to the first

issue, whether benefit contributions are due for hours that are paid but not actually worked depends on the terms of the collective bargaining agreement and the Trust documents.

Loan forgiveness. A key question for employers is whether reduction or cessation of employee benefit contributions will reduce the employer's loan forgiveness. Employee benefit contributions clearly are a legitimate use of PPP funds and may be included in the forgivable amount. The CARES Act names "payroll costs" as one of the forgivable uses of PPP funds, and defines it to include salary or wages; payments for vacation, parental, family, medical, or sick leave; payments for the provision of group health benefits; and payments to defined contribution or defined benefit retirement plans.¹

Forgivable payroll costs are capped at \$100,000 of each employee's pay, but the FAQ clarifies that this cap does *not* include non-cash compensation such as retirement contributions and health benefits, meaning that the forgivable amount includes up to \$100,000 in wages *plus* any benefit contributions. The question is whether an employer *must* pay such benefit contributions in order to obtain total forgiveness.

The CARES Act states that the employer's loan forgiveness will be reduced by "the amount of any reduction in total salary or wages of any employee," but does specify whether cuts in employee benefit contributions count as a reduction in "total salary or wages." For example, if the employer is using PPP to maintain employee pay while employees are off work, and the employer eases making 401(k) plan contributions, is this a reduction in employee salary or wages that will reduce the employer's forgiveness?

The law and guidance are not clear on this point because the terms payroll, salary and wages, and compensation are used in different places without being defined further. It is not clear that they all mean the same. The SBA indicated it will issue more guidance on loan forgiveness in the future. However, interpreting maintenance of compensation in parallel with the definition of "payroll costs" seems consistent with the PPP's goals. For now, employers should assume that maintenance of employee benefit contributions is necessary for full forgiveness until they hear otherwise.

Other collectively-bargained contributions. It is not clear under the current guidance whether "payroll costs" also includes collectively bargained contributions that do not bear as direct a connection to individual employee benefits, such as contributions to LMCCs and training trusts. Unlike health, retirement, vacation, and other PTO benefits, all of which accrue directly to the employee, the Act does not mention these other types of contributions.

As with all contributions, labor law still controls the employer's obligations under the applicable agreement covering employees that are working. The question is whether those contributions are a legitimate, forgivable use of PPP loans. This depends on whether those contributions included in "wages." No answer has yet been provided. There is little indication that the law's drafters were thinking much at all about collectively bargained employment, and further guidance is needed.

¹ "Payroll costs" does not, however, include payment of any leave that qualifies for tax credits under the FFCRA.