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Before implementing any new pay structures to maximize loan forgiveness, employers must comply with applicable wage and hour laws

By Jessica Jewell, Morgan C. Nighan, and Andrew Prescott

The Small Business Administration's (SBA) Interim Final Rule on Paycheck Protection Program (PPP) loan forgiveness brought some welcome news for employers who are trying ensure they spend their loans in a way that maximizes loan forgiveness. Specifically, as Nixon Peabody reported in an earlier alert,[1] employers can now safely provide bonuses and hazard pay to their employees without running the risk that such payments will not be forgiven. While this is welcome news, employers must be mindful that they continue to follow local, state, and federal wage and hour laws when they make these, or other, payroll changes. In this alert, we highlight some big-picture issues we encourage employers to consider as they determine how to structure payroll and make employment decisions from this point onward.

Bonus payments

For some time, it was unclear whether bonuses would be included as "payroll costs" for purposes of PPP loan forgiveness. Now that we know they are, employers may decide to hand out bonuses to employees. Providing bonuses is a great way to thank loyal employees, but employers may want to be careful about how they structure such payments to avoid liability. For example, certain types of bonuses could affect a non-exempt employee's regular rate of pay—important for overtime calculations—or an employer could be on the hook for a promised, but not delivered, bonus payment, if defined in a certain way. Specifically, if an employer promises employees a non-discretionary bonus for meeting certain metrics, that bonus is likely to be considered wages within the meaning of applicable law. Once a payment is a "wage," that payment becomes mandatory under applicable law and failure to pay such wages exposes an employer to potentially double, and in some instances treble, damages. On the other hand, if an employer merely promises a *discretionary* bonus to employees as incentive, applicable law is unlikely to treat such payments as

[1] See our alert, "SBA issues interim final rule on PPP loan forgiveness and unveils loan forgiveness application," May 28, 2020.

wages and therefore the employer retains the right not to make such payments if it decides to change course.

Hazard/premium pay

The SBA has clarified that hazard pay—or paying employees a higher wage for doing hazardous work—counts toward payroll costs for purposes of loan forgiveness. This is another way for employers to show their gratitude to workers who have continued to work, often in essential businesses, during the coronavirus pandemic. Just like bonuses, hazard pay will affect certain employees' regular rates of pay and overtime calculations. As employers prepare their budgets, they should not forget to include this additional increased cost to their bottom lines.

Notification to employees when rate of pay changes

Employers who plan to temporarily increase employees' wages or salaries—and therefore plan to decrease them at some point in the future—must ensure that they are making such changes prospectively. Once an employee has earned wages at a certain rate, an employer may not go back and retroactively decrease an hourly rate or salary for hours already worked and wages already earned. Employers must also be aware of any applicable local or state law that requires specific notification to workers when their rate of pay changes. Employers who are ultra-focused on PPP forgiveness may fail to provide the requisite notice to their employees and inadvertently commit a wage and hour violation.

Employers have many options when it comes to deciding how to spend their PPP money. They should seek legal counsel about any legal consequences of such payments before doing so. For more information about the content of this alert, please contact your Nixon Peabody attorney or:

— Jessica Jewell, 401-454-1046, jsjewell@nixonpeabody.com
— Morgan C. Nighan, 617-345-1031, mnighan@nixonpeabody.com
— Andrew Prescott, 401-454-1016, aprescott@nixonpeabody.com