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Temporary Staffing Agencies Are the Employers for Purposes of PPP Loans

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) provides financial assistance via the Paycheck Protection Program (“PPP”) and Emergency Injury Disaster Loans to small businesses. The Act also provides relief for mid-sized businesses through a dedicated program under the Exchange Stabilization Fund.

Confusion has arisen under the PPP in cases involving third-party business arrangements as some businesses and lenders are uncertain as to which entity should count the employees in determining their eligibility for loans; and which entity can include the wages and salaries of the employees as “payroll costs” in determining their maximum loan amounts.

Small Business Administration (“SBA”) guidance addresses those questions only in the case of a “payroll provider” or professional employer organization (PEO). Such providers act as agents for the employer using the services—but the employees with respect to whom the services are provided are solely the employees of the user firm for PPP purposes (i.e., the payroll provider or PEO is *not* considered the common law employer of the employees). Thus, SBA guidance provides that only the user firm can include the employees in its headcount for purposes of loan eligibility and only the user firm can include the employees’ wages and salaries as “payroll costs” in determining its loan amount under the PPP.

SBA guidance does not, however, address how such issues should be handled in the case of temporary staffing agencies and their client businesses. Unlike payroll providers or PEOs, which are simply “employers of record,” traditional temporary staffing agencies are generally considered common law employers of the temporary employees they assign to clients under longstanding [guidance from the U.S. Internal Revenue Service](#), and court rulings. While SBA rules state that staffing agency clients also should count the agency’s temporary employees in determining the client’s size, clients generally are not the common law employer. And since generally applicable legal principles hold that there can be only one common law employer, only the staffing agency should claim their temporary employees’ wages and salaries as part of their payroll costs in determining its loan amount under the PPP. Staffing agency clients should not claim the temporary employees for that purpose.

The SBA continues to issue guidance under the PPP, and such guidance should be reviewed to determine any impact on this important issue.

Interested staffing agencies should consult with their legal, financial and tax advisers, as well as an SBA lender, in determining their eligibility for, and benefits of, the PPP program. As noted, future guidance is pending with respect to the PPP which may modify the information contained above which is not intended to be, and should not be construed as, legal advice.