



THE MANUFACTURERS' ASSOCIATION  
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## COVID-19 Update Webinar FAQs

April 2<sup>nd</sup>, 2020

If you'd like to HEAR the recorded audio (after the 2:50 mark) from this webinar, [go here](#)

1. It's my understanding that EIDL loans can be re-financed into PPP loans. Is there any downside risk to applying for an EIDL loan now and re-financing to a PPP loan later? Would this be better than applying for a PPP loan directly? Pros & cons of this approach?

**If you received an SBA loan made between January 31, 2020 and April 3, 2020 (so essentially, you already have an EIDL loan...) you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it doesn't affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount of the PPP loan.**

**The major benefit of applying for a EIDL loan now and re-financing it is the \$10,000 you receive within 3 days of the loan being approved (Although it seems it could take three or four weeks for this loan to get approved).**

**You will need to be able to prove that the EIDL loan was not used for payroll if you intend to utilize both facilities. In the event you do plan to use both facilities for payroll, you will have to refinance the loan into the EIDL (at least that has been the consensus up until this point although guidance doesn't explicitly say this.)**

**One of the "cons" identified with refinancing the EIDL loan into the PPP was that it could slow down the underwriting process for the PPP, although I suspect this would not be the case if you are just applying for the EIDL at the same time as the PPP. I am not entirely sure that you would receive the EIDL before the PPP, and certainly not be able to plan for the refinance of the unapproved EIDL loan at the time you apply for the PPP loan (it is advisable to apply to the PPP loan as soon as possible, it is first-come-first-serve and many expect the facility to be oversubscribed although no one can estimate to what extent.)**

**If you have verifiable expenses for which to use the EIDL loan then it would be worthwhile to apply for both, if you were intending on using it for the purpose of refinancing into the PPP, the benefit would be the \$10,000 up front, which given the timing now that the PPP is available may not hit before the PPP funds are disbursed given the uncertainty of funding timing across both facilities. Net / net, you will lose the \$10k advance from your EIDL in your forgivable portion of the PPP.**

2. Can an essential business employer cut employee wages/salaries? **Yes**



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3. As far as the leave goes, at our company, for FMLA employees are required to use all their sick & vacation time before they're able take FMLA, does that same rule apply to the emergency FMLA offered under this?

**I think there may be a bit of confusion. Employees can use or an employer can force the use of sick time and PTO/Vacation when they request FMLA. However, this usage of time that is paid runs concurrently with the FMLA time. You don't have them use their time and then start the 12-week clock.**

**As for the FMLA extended leave for this purpose, the only reason an individual would use the paid FMLA extended leave is for the loss of childcare, not for any other reason.**

**Keep in mind that the last ten weeks of FMLA in this case is paid at 2/3 the employee's regular wages to a \$200 per day cap. Under the FFCRA, you are not permitted to require employees to exhaust their time first. Keep in mind that this is paid FMLA leave unlike regular FMLA Leave which is unpaid.**

4. The poster regarding the leave time, does that have to be handed out to all employees or do we just post it (we have remained open thru all of this.)

**Must be conspicuously posted in the worksite and/or on the employer's website or mailed or emailed to those who work remotely.**

5. Just to reiterate, the sick time is also capped at \$200 per day when caring for a child, correct?  
**That is correct. Individuals who take the two weeks of Sick Time Paid Sick Leave to care for a child because the school and childcare are closed will be paid 2/3 100% of their regular wages up to a maximum of \$200 per day for 80 ours. After the 80 hours are paid, and if the employee has asked to use the Paid Sick Leave as their first two weeks of FMLA, the remaining 10 weeks of Paid FMLA will be paid at 2/3 the employee's regular rate up to a maximum of \$200 per day.**

6. For employees that are requesting to use the sick/FMLA time is there any way to ensure they are truly eligible. Example: We have an employee who has domestic relations payments go out weekly, but he said he needs to be off for his children, then said he only has them every other week, how does that work? Also when there's a spouse or second parent in the household, can both parents be off to care of the child, how can we be sure the other parent isn't already using this as the reason with their employer that they need to be off on paid leave? What if there are two parents and one does not work and the second wants to be off to care for the child, is that allowed?



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**If your employee presents that they care for their child every other week, they are permitted to use the FMLA intermittently in full-day increments. Employees are still required to complete the FMLA paperwork.**

**Employees must provide their employer documentation in support of your paid sick leave as specified in applicable IRS forms, instructions, and information.**

**You, as the employer, may also require the employee to provide additional information in support of taking expanded family and medical leave taken to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this may include a notice of closure or unavailability from your child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to you from an employee or official of the school, place of care, or child care provider. Your employer must retain this notice or documentation in support of expanded family and medical leave, including while you may be taking unpaid leave that runs concurrently with paid sick leave if taken for the same reason.**

**It would not be HR's responsibility to police a spouse or another parents' leave time/pay request through their employer. The best we can do is trust our employees are doing the right thing. The disincentive for employees to do this would be the fact that they continue to exhaust all of their FMLA time for the next year and their pay is only 2/3. It would behoove them to use intermittently with their spouse or other parent.**

7. Is there any way they can touch base on unemployment and whether we should lay off or pay employees to stay home? Because we are not sure that we will get reimbursed if we take a loan out and the employees collect UC

**A layoff can be for an indefinite period, but the employment relationship is severed. In a furlough, employees have an expected return to work date(s) and is typically a decrease in amount of time worked. Under a layoff, benefits can be terminated in line with the Plan Document. During a furlough, health benefits remain in effect, with or without the employee's contribution being collected. All ancillary benefits can be terminated until employees return. However, you are encouraged to check with your broker on how each Plan is written. Furloughed employees are for all intents and purposes considered active employees.**

**A company will want to look at the benefits of continuing payroll without laying off or furloughing employees. Looking at the loans to continue payroll would be an option. You should seek counsel from your CPA or Attorney to see which makes the most financial sense for you.**



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**If you feel you will not qualify for the loan, it makes sense to furlough or lay off your employees so they can collect the UC weekly benefit in addition to the \$600 weekly benefit under the CARES Act.**

8. Are any manufacturers paying an additional incentive during this crisis?

**Some employers have been creative in providing incentive pay or bonus pay during this time. If you are considering any incentive, hazard or bonus pay, please refer to the guidance document at the end of this FAQ so you understand that you are correctly calculating and paying employee according the Fair Labor Standards Act and not creating legal and financial exposure for the businesses.**

9. I am confused about how the employee is to be paid for being off for their child's school being closed. Information states that the individual can take up to 12 weeks off and that they will be paid 2/3 of their regular pay rate. But then it says for the first 2 weeks, the employee may take paid sick leave or substitute vacation or personal leave. So is the employer supposed to pay the employee 2/3 of their regular rate for 10 weeks or for 12 weeks? Thank you.

**Under this scenario, the employer should be paying under the Paid Sick Leave Act 100% 2/3 of the employee's pay for the first two weeks up to a maximum of \$200 per day. After those two weeks, they would be paid for the next ten weeks under the FMLA Extension Families First Act at 2/3 or their regular wages up to \$200 per day. An employer may not require an employee to use their PTO or Sick Time or Vacation time during those first two weeks. Also, technically, and employee must ask for this leave.**

10. What form are we basing payroll costs for the last year? Is it PAUC or 941?

**Federal 941**

11. What is the applicability of this to self-employed individuals operating as single member LLCs?

**Yes, the Paycheck Protection Loan is applicable, the program is starting April 10, 2020 for independent contractors and self-employed individuals. We encourage to you reach out to your banker now as the available funding has a cap.**

12. Are non-profits such as the Association (!) or private schools eligible for PPA loans?

**Yes, 501c3 charitable non-profits, religious organizations and veterans' organizations. Trade associations or professional associations who are typically 501c6 or 501c4 nonprofits are not eligible.**



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13. Should you include annual bonus money in the total when figuring out your monthly payroll expense? **YES**
14. Do you recommend opening a separate account to put the money in from the load and run payroll / rent / etc. out of that account for tracking purposes?  
**I wouldn't necessarily recommend a separate account, as it could be cumbersome. What matters is being able to demonstrate to the bank that the company incurred qualified expenses during the 8-week period. The specific account used won't be relevant.**
15. I thought the need to stay home with a child was 2/3 pay from the first day not after 2 weeks  
**That is correct. That was an error earlier. For childcare reasons is at 2/3 the pay for the Paid Sick Time and extended FMLA**
16. What if an employee says they have a low immune system and are afraid of getting the virus at work, so they want to stay home. Do they qualify for any of the paid leave?  
**No, they do not, unless they have a recommendation from their doctor that they self-quarantine. Documentation must be provided from the doctor within a reasonable period of time. However, the employer should accept the employee's word and obtain the documentation later. If they do not have a doctor's recommendation, the employer probably should treat this inquiry as a request for a reasonable accommodation under the ADA and may want to start the interactive process. This would be an instance when the employer should consult with its attorney for case-by-case guidance.**
17. If, for example, a dental practice or restaurant or hotel has laid off employees because the businesses are closed and the business doesn't anticipate reopening until 6/30 and therefore rehiring employees at that time, what happens with this 8 week window to calculate payroll for the purpose of loan forgiveness.  
**The payroll during the 8 weeks will be based on how much was paid to employees in cash during the period - whether the company was open for business or not. The purpose of the Act is to ensure employees are being paid during this especially difficult time. If payroll is not paid, then qualified expenses will be lower, and forgiveness of the loan may end up being less due to FTE test and compensation reduction test.**
18. I have an employee who has a doctor note that he is high risk and should stay at home. What must we pay him?  
**This employee would be eligible for the two weeks of sick pay at 100% of the regular wages up to a maximum of \$511 per day. He would then also file for unemployment for the weeks subsequent to those initial two weeks. No FMLA involved in this case.**



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## Understanding Hazard Pay

Prepared for The Manufacturers' Association for 4/2/2020 Conference Call

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**Concern:** If employers are using bonuses as incentives during Covid19, are they correctly calculating and paying employee according to the Fair Labor Standards Act or are businesses creating legal and financial exposure?

**Concept:** Using Hazard bonuses increases the hourly rate of pay for Overtime calculations.

**Situation where scenario would likely apply:** Where these 3 factors occurred in a single workweek:

- Non-Exempt employee, - Hourly employee
- Overtime- the employee **works more than 40 hours** in a regular 7 day work week
- Bonus in effect- like Hazard Pay

### FAQs

#### Q. 1 How do you calculate Regular Rate?

The formula to compute the regular rate is:

**Total compensation** in the workweek (this includes hazard pay) ÷ Total hours worked in the workweek = **Regular Rate** for the workweek

<https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>

#### Q.2 What is included in Regular Rate?

When calculating an employee's regular rate, all compensation received by the employee in a workweek must be included, including wages, **bonuses**, commissions, and any other forms of compensation. [29 CFR 778.109](#).

**Q.3 Does the FLSA require hazard pay?** No, but if you use it as an incentive make sure you include it in the regular rate.

“The [Fair Labor Standards Act \(FLSA\)](#) does not address the subject of hazard pay, except to require that it be included as part of a federal employee's regular rate of pay in computing the employee's overtime pay. “ <https://www.dol.gov/general/topic/wages/hazardpay>



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**Q. 4 What is a Non-Discretionary Bonus?**

**Bonus that you pay your employees “for working”.** (examples shift differentials, attendance bonuses, hazard pay, commissions sales bonuses, production bonuses)

“A bonus is nondiscretionary, if the employer has created an expectation of payment and is no longer free to determine the timing or amount of payment without breaching legal or contractual agreements with its employees. Nondiscretionary bonuses are often based on employee or group performance. Performance can be measured by meeting a specific goal, including production standards and sales targets.

Generally, employers and employees agree in advance on the method and timing of payment of nondiscretionary bonuses. This is the case for commission wages, sales incentives and other rewards offered in direct correlation to the employees’ quantity and quality of work.

**Nondiscretionary bonuses are part of an employee’s weekly compensation and must be included in the determination of a regular wage rate.”** <https://www.sullivan-benefits.com/wp-content/uploads/Bonuses-Discretionary-versus-Nondiscretionary-12318.pdf>

**Q.5 How is overtime calculated?**

When an employee is entitled to overtime pay, it must equal at least one and one-half times his or her “regular rate” for each hour (or fraction thereof) of overtime. The regular rate includes all compensation received by the employee in the workweek with a few statutory exclusions. Overtime pay is based on hours worked in excess of 40 hours during a given workweek. [29 U.S.C. § 207(b)(1)]- Payroll Answerbook

**Q.6 Could Hazard pay be discretionary and not be factored into overtime. Most likely, no.**

Recent guidance on discretionary “non-work” bonuses:

<https://www.dol.gov/agencies/whd/overtime/2019-regular-rate>

**Q.7. Calculations - Next page (3)**

Disclaimer: Please note I’m not an attorney! I have included law and legal references for your additional information. If you have more questions, please find legal counsel with experience in employment law!

**To contact John who is attorney:**

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### Calculation Examples

If an employee works for 50 hours at \$20 and there is \$100 Hazard bonus. The employee should be paid \$1210

|                    |   |                     |                          |                   |        |
|--------------------|---|---------------------|--------------------------|-------------------|--------|
| Job 1 Total:       |   |                     |                          |                   |        |
| \$1000             |   |                     |                          |                   |        |
|                    |   | +                   | Non-discretionary Bonus: | =                 | Total: |
|                    |   |                     | \$100                    |                   | \$1100 |
| Total:             | / | Total Hours:        | =                        | New Regular Rate: |        |
| \$1100             |   | 50                  |                          | \$22              |        |
| New Regular Rate:  | X | Overtime Rate:      | =                        | Overtime Rate:    |        |
| \$22               |   | 1.5                 |                          | \$33              |        |
| Regular Hours:     | X | New Regular Rate:   | =                        | Total:            |        |
| 40                 |   | \$22                |                          | \$880             |        |
| Overtime Hours:    | X | New Overtime Rate   | =                        | Total:            |        |
| 10                 |   | \$33                |                          | 330               |        |
| Total Regular Pay: | + | Total Overtime Pay: | =                        | Final Pay         |        |
| \$880              |   | 330                 |                          | 1210              |        |

← Straight time  
Hours 50 x \$ 20

← The bonus pushed the regular rate from \$20/hr to \$22/hr