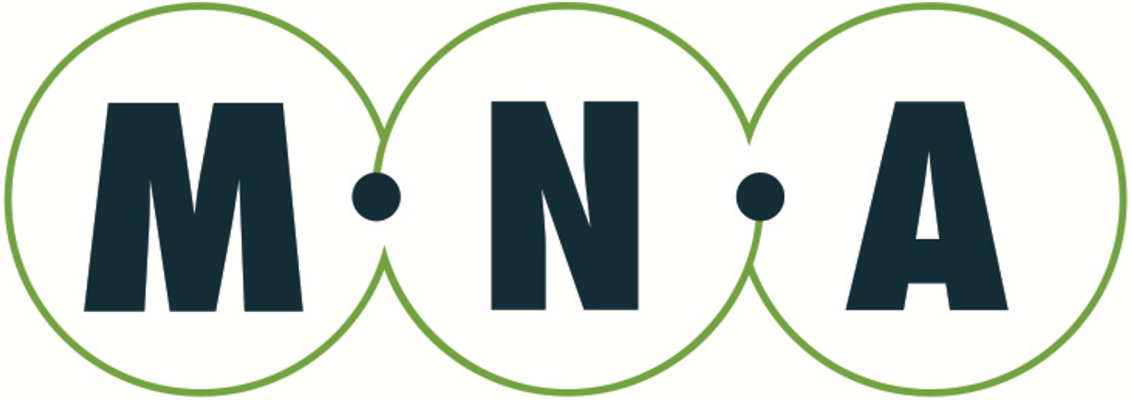


Montana Nonprofit Association

Presented by Jim Nys
Westaff of Helena
April 13th, 2020

Unemployment Insurance

- ★ Background on Unemployment Coverage for 501(c)(3) Nonprofits
  - Nonprofits fall into one of three categories for the purposes of UI laws:
  - Some charitable nonprofits pay quarterly taxes based on their "experience rating," a formula based on the recent history of unemployment claims by their former employees.
  - Charitable nonprofits have the option of electing to self-insure and are required to reimburse their state unemployment insurance trust funds for the amount of benefits their terminated or laid off employees claim.
  - Some nonprofits are exempt from unemployment laws. These include houses of worship, religious organizations that are affiliated with houses of worship, and religious schools.
  - The CARES Act provides federal funding (Pandemic Unemployment Assistance) so states can provide UI benefits to employees of exempt nonprofits who are out of work due to COVID-19.

Covid-19 UI Claims

- ★ Governor Bullock Issued Emergency Rules on 3-17-20 that states at Rule II (8):
  - An employer is relieved of charges arising from a COVID-19 layoff and paid pursuant to emergency RULES I through IV.
- ★ USDOL issued UIPL 18-20 which includes two problematic interpretations:
  - States must require self-insured nonprofits to reimburse their UI trust funds for the full amount of their COVID-19 related UI claims and then seek reimbursement from their state UI trust funds of 50% their reimbursement
  - If states cover more than 50% of self-insured nonprofits' claims from their UI trust funds will not receive full federal support under Section 2103 of the CARES Act.

Montana Q&A on this Issue

- ★ Does Section 2103 of the CARES Act … require the State of Montana to collect the other 50% of the reimbursement from those employers?
  - No. ... the state is free to supplement with whatever funding it deems appropriate. Section 2103 (a) of the CARES Act (P.L. 116-136) provides flexibility for states regarding reimbursable employers to make timely payments under state laws.
  - The fact that Section 2103 of the CARES Act provides for partial federal reimbursement for unemployment compensation related to reimbursable employers paid during the COVID-19 pandemic does not limit the State of Montana from providing that employers will be relieved of all charges for benefits paid under the COVID-19 pandemic.

Montana Non-Profits

- ★ Timeline:
  - The Montana UI rules relieving reimbursable employers is dated March 17th, 2020
  - The Montana Q&A was issued April 17th, 2020-
  - UIPL 18-20 is dated April 27th
- ★ At least as of today, Montana has chosen to cover the 50% of costs that will not be reimbursed by the feds.

Reimbursement Uncertainties

- ★ Qualifying costs are those expenditures made in the 8 weeks following the day that the loan is disbursed to the borrower.
  - The date of disbursement will likely not coincide with payroll periods so an allocation of costs will be necessary. You likely will have to split payrolls, benefits payments and other expenses.
  - CPA's caution against things like accelerating payroll to cause it to fall within the 8 week period.

Qualifying Costs

- ★ The SBA defines qualifying costs as:
  - Employee (who live in the U.S.) compensation in the form of salary, wages, commissions or anything similar
  - Cash tips or the equivalent, which are based on employer records of past tips or reasonable, good-faith employer estimate if there are no past records
  - Vacation, parental, family, medical or sick leave payments
  - Healthcare coverage, including insurance premiums, and retirement
  - State and local tax payments based on employee compensation
  - Wage, commission, income or net earnings from self-earners or similar compensation
- ★ Funds covering qualified costs will be completely forgiven if you use at least 75% of the loan toward qualifying payroll costs.

Qualifying Costs

- ★ The other 25% of funds can be used to cover:
  - Costs related to group healthcare benefits during paid sick, medical or family leave as well as insurance premiums
  - Mortgage interest payments (not including mortgage prepayments or principal payments)
  - Rent
  - Utilities
  - Interest on any other debt you accrued before February 15, 2020

Non-qualifying Costs

★ What costs DO NOT meet PPP loan forgiveness requirements?

- Employee compensation for workers whose main residence is outside of the U.S.
- Compensation for an individual employee whose annual salary exceeds $100,000 (prorated as necessary).
- Compensation for workers who receive 1099s instead of W-2s
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020 — this includes the employee's and employer's share of FICA and Railroad Retirement taxes and income taxes withheld from workers
- Qualified sick and family leave costs for which credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act

Uncertainties

- ★ There are many undefined terms and conflicting provisions that will require further definition and guidance. Here are some of them:
  - What does it mean when it says “costs incurred and payments made” within the 8-week covered period will be forgiven?
  - Does it require that costs be BOTH incurred and paid or just incurred OR paid?

Uncertainties

- How do the two "covered periods" interact?
  - Section 1102 of the CARES Act provides that PPP loans are only available during the "covered period" of February 15 – June 30, 2020, and during that time, may only be used to pay payroll costs, mortgage interest, rent, utilities, and interest on other debt.
  - However, Section 1106 provides that only amounts spent during the "covered period" are eligible for forgiveness.
    - But for these purposes, the covered period is the 8-week period following the receipt of the loan proceeds.
  - Will payments made post-June 30th be eligible for forgiveness?

Uncertainties

- ★ Are payments made with forgiven funds deductible?
  - Section 1106 of the CARES Act states that amounts forgiven on a PPP loan "shall be excluded from gross income."
  - Section 265 of the Internal Revenue Code provides that expenses "allocable to" tax-exempt income are not deductible; this prevents a "double dipping" of sorts, whereby a taxpayer would otherwise get both a deduction and tax-exempt income related to the same transaction or investment.
  - Historically, Section 265 has applied to items like interest expense incurred to generate tax-exempt interest income, but there's no reason to believe it couldn't apply to expenses paid with forgiven PPP proceeds.

Uncertainties

- ★ Can a business pay interest on non-mortgage debt during the covered period and have it forgiven?
  - Section 1102 of the CARES Act allows a borrower to use the funds to pay "interest on any other debt obligations that were incurred before the covered period."
  - But Section 1106 of the Act, which details the items eligible for forgiveness, that final item "any other debt obligation" is absent.
  - It appears Congress will allow a borrower to use the funds to pay interest on a non-mortgage debt during the covered period, but won't allow a borrower to have that amount forgiven.

Uncertainties

- ★ Can an organization have self-rental payments forgiven?
  - The CARES Act – in allowing a business to pay rental expenses during the covered period and have those payments – subject to the 25% cap on non-payroll costs – forgiven, do not differentiate between payments made to unrelated third parties and related entities.
  - As you might imagine, this might encourage some businesses to temporarily increase the rental rates so as to maximize PPP loan forgiveness.
  - Additionally, Do “rent payments” extend to payments for leased equipment, or merely to real estate?

Uncertainties

- ★ How do we calculate FTE's for purposes of forgiveness reduction?
  - Do we use 40 hrs or 30 hrs (as in the ACA) or something else?
  - Under the CARES Act, reductions between February 15 and April 27, 2020 will be ignored if no later than June 30, 2020, the business has restored the employee levels to what they were on February 15, 2020.
    - So if the 8 week period ends May 1st with a reduction but they are rehired June 27th for a week is forgiveness allowed?
    - Is forgiveness affected if people are laid off after either the 8 weeks or June 30th?
  - The rule does not seem to differentiate between layoffs and resignation based reductions.

Uncertainties

- ★ The reduction in forgiveness amount is required if the reduction in wages over the 8-week period is in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.
  - This rule appears to be saying that if during the 8-week covered period you get paid less than 75% of what you did during the previous calendar quarter prior to the covered period, your forgiveness amount is reduced.
  - But 8 is only 67% of 12; so if employee A earned $12,000 for twelve weeks in the previous calendar and $8,000 during the 8-week covered period, is the business required to reduce its forgivable amount by $1,000, the excess of the reduction ($4,000) over 25% of the $12,000 salary ($3,000)?

Uncertainties

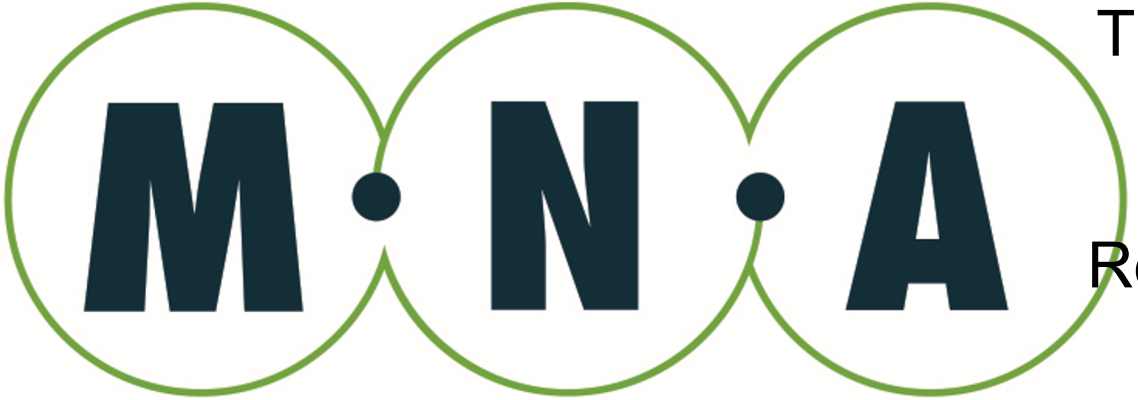
- ★ Borrowers who:
  - submit incomplete forgiveness documentation are ineligible for forgiveness.
  - do not spend 75% of the loan on payroll are ineligible for forgiveness
- ★ But that would leave a 1% loan on the bank's books
- ★ Some banks are directing borrowers to return funds not expended in the 8 week period.

Member Questions

- ★ If we receive a PPP loan and bring staff back to work and after 8 weeks our revenue doesn't increase enough to keep staff and manage daily operations, Can staff be laid off again?
- ★ If we reopen later than the suggested date of April 27 and staff have multiple jobs, one of which opens May 4, how does that effect our organization or them for UI?

Member Questions

- ★ We have a PPP loan so do we need to suspend use of FFCRA hours by employees during the loan period?
- ★ As a follow up, how do they calculate payroll for the PPP loan when our pay periods don't align with the loan period?



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That Today's Webinar

Remember to send questions to emma@westaffmt.com