

Partnering with a PEO Does Not Negatively Influence Qualification for a CARES Act Loan

With the recent passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), many businesses have begun to ask whether contracting for services with a professional employer organization (PEO) will interfere with the business's ability to qualify for a CARES Act loan, including under the new Paycheck Protection Program.

The answer is a resounding "NO!" according to case law, statutory regulations, and statements made by the Small Business Administration (SBA).

The Concern

- Sections 1101, et. seq., of the CARES Act creates a new line of small business loans—funded by over \$349 billion — for relief from economic pressures caused by the COVID-19 outbreak.
- These loans were created by (among other things) amending Section 7(a) of the Small Business Act (the SBA), which is the statute that governs small-business loans in less turbulent times.
- In general, to qualify for one of these new loans, the business must have fewer than 500 employees.
- In a traditional PEO relationship, while the business employs the employees for purposes of day-to-day worksite functions, the PEO acts as the administrative employer by paying wages and collecting and remitting payroll taxes under its own FEIN not only for the business's employees but all of the PEO's other business clients.
- Given this relationship, some small businesses are concerned that they will not qualify for the new loans if the "500 or fewer" requirements (or other similar requirements) are examined at the PEO level — which could have hundreds of thousands of co-employees — rather than at the client level.

The Solution

- As far back as 1989, the Small Business Administration's Office of Hearings and Appeals reversed its regional office's determination that the PEO's total number of co-employees must be counted against the small-business client. In reversing, the tribunal found that the PEO was merely acting as an administrative employer and so only the employees of the small-business client would be counted. *SIZE APPEAL OF: Maryland Assemblies, Inc.*, 1989 SBA LEXIS 74 (SBA Office of Hearings and Appeals).
- Based in part on *Maryland Assemblies*, 13 CFR § 121.103(b)(4) of the SBA's affiliation regulations were amended to echo the same result:

BUSINESS CONCERNS WHICH LEASE EMPLOYEES FROM CONCERNS PRIMARILY ENGAGED IN LEASING EMPLOYEES TO OTHER BUSINESSES OR WHICH ENTER INTO A CO-EMPLOYER ARRANGEMENT WITH A PROFESSIONAL EMPLOYER ORGANIZATION (PEO) ARE NOT AFFILIATED WITH THE LEASING COMPANY OR PEO SOLELY ON THE BASIS OF A LEASING AGREEMENT.

- Additionally, Question (6) on page 16 of the Small Business Administration's own Small Business Compliance Guide: Size and Affiliation dated June 2018 agrees:

(6) A BUSINESS THAT LEASES EMPLOYEES FROM A BUSINESS PRIMARILY ENGAGED IN LEASING EMPLOYEES TO OTHER BUSINESSES OR WHICH ENTER INTO A CO-EMPLOYER ARRANGEMENT WITH A PROFESSIONAL EMPLOYER ORGANIZATION (PEO) IS NOT AFFILIATED WITH THE LEASING COMPANY OR PEO SOLELY BECAUSE IT LEASES OR CO-EMPLOYS EMPLOYEES.

EXAMPLE: COMPANY A LEASES 80% OF ITS EMPLOYEES FROM A COMPANY THAT PRIMARILY LEASES INDIVIDUALS TO OTHER COMPANIES. COMPANY A IS NOT AFFILIATED WITH THE LEASING COMPANY SOLELY BECAUSE OF THE LEASING RELATIONSHIP.