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For PPP recipients: You may be subject to whistleblower lawsuits under false claims law

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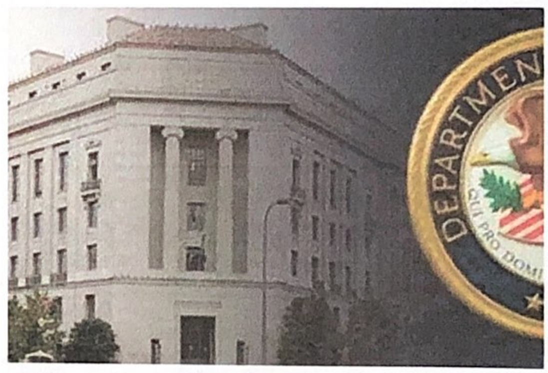

U.S DEPARTMENT OF JUSTICE

U.S. Department of Justice building in Washington, D.C.

For the vast majority of small businesses that received money under the Paycheck Protection Program (PPP) initiative, the structure of the loan terms may have inadvertently exposed them to a well-known, but rarely used, federal law.

When the spread of Covid-19 resulted in states closing shops, restaurants, manufacturing operations and other businesses, Washington lawmakers moved fast to pass the $2.2 trillion Coronavirus Aid, Relief and Economic Security (CARES) Act, which set aside more than $660 billion for businesses. That money, primarily designed to reach small businesses, was offered as a low-interest loan but could be transferred to a grant if the borrower meets the spending requirements that are mostly tied to payroll expenses, mortgage/rents and utility costs.

And that ability to switch a federal loan to a grant may have opened up millions of small businesses across the country to whistleblower lawsuits under the False Claims Act (FCA). Also called the "Lincoln Law," the FCA is the federal government's primary litigation tool in combating fraud against the government.

Historically, in the corporate world, workers and executives of large companies who have large contracts with the federal government are known to have used the statute after claiming corporations misused the federal dollars through misrepresentation, incorrect billing practices or fraud. The U.S. has recovered billions of dollars because of fraudulent use of Medicare and Medicaid reimbursement procedures. Also, corporations were ordered to pay it back after it was established that executives misused money from large defense contracts.

In recent weeks, the demand for PPP loans went far and wide across businesses that employ anywhere from one to 500 workers. The vast majority of them have had no financial relationships with the federal government other than keeping up with their federal taxes. While some have had standard loans with the U.S. Small Business Administration, the PPP net is expected to capture more than 5 million businesses when the program runs out of money in the next few days.

And almost all of them would now be exposed to whistleblower lawsuits because of the forgiveness structure of the loan.

In addition, what may be more concerning is the use of a little-known provision with the FCA called *qui tam* that allows the federal government to reward whistleblowers with a portion of the money the government recovers from the eventual settlement with the company. In essence, *qui tam* could pit workers against their employers if a worker believes the PPP loan was acquired through misrepresentation or the loan money is not being properly used to meet forgiveness guidelines.

"I have already gotten a few calls from workers in recent days," says David Caputo, a Philadelphia attorney who represents whistleblower clients across the nation. A Harvard Law School alum, Caputo adds that the uber speed of enacting the CARES Act and immediate disbursement of the dollars to Main Street America has opened up the possibility for abuse of the program.

"I think there will be pretty aggressive enforcement from the government early on," predicts Caputo, adding that before workers come forward claiming fraud and misuse, the government will showcase its own investigations.

On May 5, the U.S. Department of Justice charged two New England men with fraudulently applying for more than $500,000 in PPP loans.

For PPP borrowers, it will come down to keeping track of the expenses and calculating them properly when the time comes to ask for forgiveness of the loans.

Adina Safta, a Raleigh, North Carolina, consultant who works with small-business owners to keep their books clean and up-to-date, says she has advised clients that PPP funding accounts should be kept in a separate bank account.

"I do a weekly call with clients every Monday defining the (PPP) expenses that are planned for the week ahead, and then I track them," Safta says. "On Fridays, we do a check-in call to finalize and approve the expense report, amount listed, and at that point, the owner reimburses that exact amount back to their operating account."

Safta adds the most crucial part of this process is not getting the funds and the subsequent focus on forgiveness, but rather what a business does daily and weekly to ensure that books are accurate, factual, and that owners are keeping honest to any changes. "We plan to have a pulse check at the end of May to reassess and discuss where we are in the usage of the PPP funds," she says.

But the risk to small businesses is far greater than just keeping the books clean.

In a *qui tam* lawsuit, a worker, through his or her attorney, could provide documentation to the Justice Department that may not reconcile with the paperwork submitted by the business as part of the forgiveness requirements. Then, the federal agency can decide if it wants to join in on the suit or watch the court proceedings as an interested party. If the settlement or an ensuing charge goes in favor of the plaintiff, the worker gets a portion of the monetary judgment as a reward. Caputo says the court could treble the damages in many cases.

"I think it could become a huge issue in about a year," says James Norment, a government relations attorney in New Bern, North Carolina. "We will see a big line of these *qui tam* lawsuits tied to the PPP documentation."

Norment wrote a piece with his colleague on his law firm's website detailing other risk factors tied to the PPP loan. "While these individual complaints may arise from a genuine concern and interest in preventing abuses of this massive loan program, other facts may motivate a whistleblower, including personal greed (whistleblowers may receive a percentage of what the government recovers in a False Claims Act investigation) or a vendetta against the company," the authors wrote.

For now, however, lawsuits and charges have started to fly from both sides. Initially, many borrowers of small loans sued their banks claiming the lending institutions favored their bigger clients to get the federal money, thereby leaving the small businesses without access to the funds.

Bank of America (NYSE: BAC), Wells Fargo (NYSE: WFC), JPMorgan Chase (NYSE: JPM) and US Bank (NYSE: USB) are some of the biggest banks, while borrowers in smaller towns are going a similar legal route as well.

While most of the cases are pending, the Office of the Comptroller of the Currency, an independent bureau with the Treasury Department, issued a note to banks in late April urging the financial institutions to "prudently document their implementation and lending decisions."

What remains to be seen is when *qui tam* lawsuits start rolling in, could the lenders be dragged into the litigation process?

"There is an enormous potential of fraud," Caputo says. "Workers may call because they may be worried about themselves, and whether they have any criminal exposure."

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