

## COVID-19 Legal Update Updated April 16, 2020 @ 5pm

### Paycheck Protection Program (PPP) Loan:

We are still waiting for detailed guidance to explain the loan forgiveness requirements, but this is a common concern for those awaiting loan approval. The SBA is required to issue guidance and regulations by April 26, 2020.

***Please note this information could be changed in future guidance.***

- Loan term is 2 years, 1% interest rate; payments deferred first 6 months (still accrue interest); no prepayment penalties.
- PPP Loan may be used for the following during the 8 weeks following loan disbursement:
  - Payroll Costs
  - Interest on any mortgage existing as of February 15, 2020
  - Rent (lease must have been in place prior to February 15, 2020 to be eligible for forgiveness)
  - Utilities (service must have been in place prior to February 15, 2020 to be eligible for forgiveness)
  - Interest on other business debt existing as of February 15, 2020
  - Other eligible uses under 7(a) of the SBA— includes inventory, supplies, and raw materials (not eligible for forgiveness)
- Payroll Costs include the following:
  - Wages, Salaries, Commission and Tips (up to the annual equivalent of \$100,000)
  - Payments for group health care benefits (medical, dental, vision) which includes the premiums paid
  - Payments for retirement benefits
  - Payments for vacation, sick, or family leave (but not FFCRA Paid Leave due to tax credit)
  - Payments for any state or local tax assessed on employee compensation

### Forgiveness Calculation

- ***At least 75% of the loan must be used for Payroll Costs; no more than 25% can be used for non-payroll costs.***
- Loan Forgiveness Amount = total Qualified Costs multiplied by the Headcount Reduction Factor, minus the Compensation Reduction Penalty.
- Qualified Costs = total incurred for Payroll Costs plus permitted rent, utility and mortgage interest expenses paid during the 8 weeks following loan disbursement (Payroll Costs must make up 75% of Qualified Costs).
- Headcount Reduction Factor = Average full-time equivalent employees (FTEs) per month\* during the 8 weeks following the loan disbursement, *divided by either*:
  - (1) average FTEs per month\* during the period of February 15, 2019 to June 30, 2019; *or*
  - (2) average FTEs per month during the period of January 1, 2020 to February 29, 2020.
  - Employers may select which period to use to calculate the Headcount Reduction Factor.
  - The Employee Reduction Factor cannot be a fraction greater than 1.
  - *\*The term “average number of FTEs” is defined as the average number of FTEs for each pay period falling within a month”; however, we recognize the impossibility of calculating monthly averages for periods not bounded by calendar months. Further guidance is required for clarification.*
- Compensation Reduction Penalty = the amount forgiven is reduced if an employee’s total salary or wages during the 8 weeks following loan disbursement was reduced by more than 25% of the employee’s total salary or wages during the full quarter before the loan disbursement (Q1 of 2020).
  - This penalty applies to only employees who earned less than the equivalent of \$100,000/yr. for all pay periods in 2019.
  - The reduction is equal to the dollar amount the reduction exceeds 25% of prior salary or wages.
  - *This penalty requires further clarification to determine how it might apply to any employee who is not reinstated by June 30, 2020.*

- If a reduction in FTEs or employee compensation occurred during the period of February 15, 2020 through April 26, 2020 and is reversed by June 30, 2020, that reduction will not be counted for purposes of calculating the Loan Forgiveness Amount. (*This provision also requires further clarification.*)
- If your PPP loan is forgiven, you may not defer social security payroll taxes as permitted under CARES Act (see IRS Guidance below).

## **OSHA Guidance**

### ***Guidance on Recording Illnesses***

On April 10 OSHA issued guidance for recording cases of COVID-19 as work-related illnesses on Form 300 (available here: <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19#ftn2>).

- Generally, Employers are required to record diagnosed cases of COVID-19 on Form 300 if:
  - (1) it is a confirmed case of COVID-19;
  - (2) the case is work-related (event or exposure in the workplace caused or contributed to the condition); and
  - (3) the case involves death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness, or a significant injury or illness diagnosed by a physician or other licensed health care professional.
- OSHA clarified that because work-relatedness determinations (#2 above) are difficult to make in areas experiencing community spread of COVID-19, OSHA will not take enforcement action for most employers for failing to make work-relatedness determinations, except where:
  - (1) There is objective evidence that a COVID-19 case may be work-related; and
  - (2) The evidence was reasonably available to the employer.
- An example of “objective evidence” is when an outbreak among workers who work closely together cannot otherwise be explained (i.e., COVID-19) is not widely spread within the local community.
- Employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions must continue to make work-relatedness determinations under the standard rules

### ***OSHA Employer Obligation Guidance:***

OSHA also published guidance for employers discussing proper measures for protecting employees from COVID-19 in the workplace: <https://www.osha.gov/Publications/OSHA3990.pdf>.

- The guidance for basic infection prevention measures aligns with most state orders.
- Most employers fall into the low or medium risk categories with lower requirements.
- This guidance lists steps businesses can take to help protect employees, which include:
  - Standard recommendations for hygiene, additional cleaning, and monitoring symptoms.
  - Provide customers and the public with separate tissues and trash receptacles.
  - Explore alternate practices, such as telecommuting and staggered shifts, or modifications to increase the distance between employees and others individuals within the workplace.
  - Discourage workers from using other workers’ phones, desks, offices, or other work tools and equipment, if possible.
- OSHA also encourages employers to develop procedures for prompt identification and isolation of sick people and communicate regularly with employees about workplace flexibilities and protections.

## ***Pennsylvania and New Jersey Employer Safety Orders***

On April 10, NJ issued an employer safety order, and PA issued a virtually identical one on April 15. Both orders largely mirror the OSHA guidance and CDC recommendations, but have the force of law. These orders require employers who remain operational to adopt specific workplace policies that affect how they treat their employees and customers, to the extent customers are on premises (e.g., retail operations). Keep in mind these are just summaries – for specific guidance requirements you will need to read each state’s order and identify how it applies to your specific workplace so you can adopt appropriate policies and rules. For questions, you can email one of the HB lawyers. NJ Order at: <https://nj.gov/infobank/eo/056murphy/pdf/EO-122.pdf>. PA Order: <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200415-SOH-worker-safety-order.pdf>.

The following Rules Apply to On-Going Operations:

1. Company Must Have the Following Workplace Safety Policies:
  - Non-essential visitors are prohibited from entering any worksite
  - Limit worksite meetings, work groups, or individual crew sizes
  - All workers must maintain six feet of distance between them
  - Staggered shift/crew start and stop times to limit the number of people who are coming in and out of the work area at the same time and limit number of people on site at one time
  - Staggered meal or other breaks to limit the number of workers in common areas at one time
  - Limit the number of people who can access common areas (break rooms, restrooms, etc.) at one time
  - Require workers & visitors to wear cloth face masks while on site unless doing so would cause a medical problem (medical documentation is not required)
  - Companies must provide face masks for all employees
  - If a visitor or employee refuses to wear a mask and does not have a medical excuse, you must deny that person entry to the worksite
  - If a specific job requires more aggressive PPE (e.g., respirators), comply with the stricter requirement
  - Require infection control practices: regular hand washing, coughing & sneezing etiquette, tissue use and disposal
  - Limit sharing of tools, equipment and machinery & provide sanitizing wipes, etc. when possible to wipe down high touch surfaces of tools, equipment, and machinery between uses
  - Provide hand sanitizer and wipes to workers and encourage their regular use
  - Frequently sanitize high touch areas like restrooms, breakrooms, equipment and machinery
  
2. Company Must have the Following COVID-19 Exposure Policies:
  - Conduct basic screening of employees at the start of each day/shift to verify they are not experiencing COVID-19 symptoms (such as no fever within the past 24 hours)
  - In PA – temperature screening required prior to start of each workday; employees with temperatures above 100.3°F must be sent home
  - Immediately separate and send home workers who appear to have COVID-19 symptoms when they show up or that develop during the workday
  - Promptly notify all workers of any known exposure to COVID-19 at the worksite while maintaining appropriate confidentiality as required by other laws
  - Clean and disinfect the worksite per CDC guidelines if a worker is diagnosed with COVID-19
  - Clean and disinfect the entire workplace at least daily, or more often if required by specific guidelines
  - Follow all State Dept. of Health, CDC, and OSHA safety rules and guidelines (as updated) for COVID-19 safe work practices

- Make sure Company has allocated appropriate supervision, responsibility and resources to each worksite so that Company can meet the above requirements
- Retail operations have significantly more requirements for customer protection which are not being listed here. Refer to the individual state orders.
- High exposure workplaces – such as hospitals, first responders, etc., are also subject to more requirements that are not being listed here.

We recommend each employer prepare written policies for each work location and make these written policies available to every employee: posting, handout, email, etc., so each employee is aware of the requirements. You should encourage reporting of violations or concerns through an identified reporting procedure so you can maintain compliance and resolve employee complaints before they become external problems.

Attached is an example employee screening protocol you may consider adapting for use in your workplace. Specific requirements should be reviewed with your attorney before implementing in your workplace.

### **Employer Liability if Employees Claim they Got COVID-19 at Work (The Walmart Case):**

Wando Evans was a 51-year-old employee at a Chicago Walmart who died on March 25 allegedly due to “complications of COVID-19.” He died 2 days after the store sent him home for showing symptoms of COVID-19 infection while at work. Evans’ attorney claimed Evans had first mentioned symptoms to store management two weeks prior to his death but was ignored. Evans’s brother filed a wrongful death lawsuit against Walmart alleging Evans contracted COVID-19 at work and Walmart failed to follow required safety protocols that would have protected him from the virus. The lawsuit also alleges another employee at the same store died from COVID-19 4 days later, and other employees at the same location showed “symptoms” of COVID-19 but were not sent home. Walmart has not even responded to the suit yet.

Lawsuits like this are scary because the national media sensationalizes these tragedies to perpetuate a false narrative that businesses cannot protect their employees. While no employer wants to get sued over something like this, employee injury and death cases are almost universally subject to the workers compensation system that gives employers immunity from such lawsuits. For these lawsuits to survive in most states, the employee (or estate) must be able to prove the employer acted intentionally or willfully to harm (or kill) the employee. For COVID-19 exposure (like other disease cases), the employee (or estate) must prove the employee contracted the disease at work (see OSHA guidance above). These are incredibly high burdens of proof that are very difficult to meet in most cases.

The takeaway from suits like these is not to overreact. Unless you are that rare employer who willfully ignored obvious safety risks, or intentionally exposed an employee with no means of protection, any lawsuit will most likely end up as a workers’ compensation claim. The employers we work with all take their employees’ safety seriously and would be sincerely devastated if any employee died as a result of something that happened at work. As difficult as it may be to accept the OSHA, CDC and individual State safety rules, the more you follow these rules, the less likely you will be to have an employee who gets COVID-19 at work, and if by some chance they do, you will be able to prove that you acted appropriately. We are advising our clients to be very visible with their safety procedures, and to be sure that management is leading by example to reassure employees that their safety is taken seriously.

### IRS Guidance on Social Security Tax Deferral:

Under the CARES Act, you may defer your share of the usual Social Security payroll taxes for the period from March 27, 2020 through December 31, 2020, with fifty percent of the deferred tax due December 31, 2021, and the remaining 50% due December 31, 2022. However, the tax deferral is not available if you receive any loan forgiveness under the Paycheck Protection Program (PPP).

The IRS guidance explains how this deferral will apply even though you won't know if your PPP loan will be forgiven (<https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020>).

- If you received a PPP loan, you can make the tax deferral, without penalty, up until the date you receive a forgiveness decision from your lender.
- If your PPP loan is forgiven, you are no longer eligible to defer social security taxes due after the date you receive the forgiveness decision.
- However, the amount of social security tax deferred up until date the PPP loan is forgiven continues to be deferred and 50% will be due on December 31, 2021, and the remaining 50% due December 31, 2022.
- Form 941, Employer's Quarterly Federal Tax Return, will be revised for the second calendar quarter of 2020 (April—June). Additional guidance will instruct employers how to reflect the deferred deposits and payments due on or after March 27, for the first quarter of 2020 (January—March).
- You will not need to make a special election to defer deposits and payments of these payroll taxes.



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The employment practices team at Harpst Becker is available for your questions about COVID-19 and other employment concerns.

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