

REOPENING NEW YORK

A Question and Answer Session for NY Employers

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COVID 19 UPDATES

- With regulators and lawmakers struggling to address the new wave of issues arising from employers reopening and bringing employees back to their workplaces, the U.S. Equal Employment Opportunity Commission (“EEOC” or “Commission”) has once again issued a series of [Frequently Asked Questions](#) (“FAQs”) addressing COVID-19-related return-to-work considerations.[1] The new FAQs offer further guidance on how to handle disability accommodation requests, address return-to-work issues involving older workers and pregnant employees, and reiterate an employer’s obligations with respect to preventing or correcting any harassment of employees of Chinese or other Asian national origin.
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COVID 19 UPDATES

- Employees are not entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.
 - Employers should be diligent in responding to and addressing pandemic-related harassment, such as demeaning, derogatory, or hostile remarks directed to employees who are, or are perceived to be, of Chinese or other Asian national origin.
 - Employers may send a general notice to all employees designated to return to the workplace noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis.
 - Requests for an alternate method of screening before entering the worksite due to a medical condition are reasonable accommodation requests and should be handled as such.
 - Employers cannot involuntarily exclude older workers from the workplace, even if for benevolent reasons such as protecting employees at a higher risk of COVID-19.
 - Employers should evaluate sex discrimination considerations when providing flexibilities, such as telework or modified schedules to employees with school-aged children.
 - A full text of the most current “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” can be found [here](#).
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COVID 19 UPDATES

Pandemic-Related Harassment

The EEOC advises employers to take the following preventive and corrective actions concerning harassment:

- Understand how to recognize any kind of harassment, including that related to the COVID-19 pandemic.
 - Instruct managers on their legal obligations; to be alert to “demeaning, derogatory, or hostile remarks directed to employees”; and “to quickly identify and resolve potential problems, before they rise to the level of unlawful discrimination.”
 - Be aware that the perpetrator of harassment can be a contractor, customer, client, or visitor, as well as a supervisor or co-employee.
 - Consider sending a “reminder” to all workers, including contractors, reiterating the legal prohibitions on harassment, the company’s policy forbidding harassment and the potential disciplinary repercussions for engaging in such misconduct, and the procedures available “for anyone who experiences or witnesses workplace harassment to report it to management.”
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COVID 19 UPDATES

DHS Further Extends Flexibility in I-9 Compliance Rules

- On June 16, 2020, U.S. Immigration and Customs Enforcement (ICE) [announced a second extension](#) of its prior guidance [relaxing the in-person verification requirements of Form I-9](#) for employers operating remotely due to COVID-19. The [original guidance](#) was adopted for an initial 60-day term, but its expiration was [subsequently extended](#) to June 19, 2020. ICE has now indicated that due to continued precautions related to COVID-19, this policy is once again extended for an additional 30 days, setting the policy to expire on July 19, 2020.
 - The policy continues to extend only to employers operating 100 percent remotely due to COVID-19. In addition, employers on which ICE served notices of inspection (NOIs) during the month of March 2020 will be granted an additional 30-day extension to respond to such NOIs. This additional 30-day extension brings the total available extension period for responding to such NOIs to 120 days from March 19, 2020.
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COVID 19 UPDATES

What Employers Should Do Now

- Understand your obligations under all applicable anti-discrimination and accommodation laws, including federal, state, and local laws, regulations, and agency guidance, and ensure that all staff is aware of the importance and how-to's of compliance, regardless of whether they are working on site or remotely.
 - Determine whether to announce to employees the process for seeking accommodations; if you decide to do so, prepare any announcement in line with applicable legal requirements.
 - Ensure that all managers and other individuals who may receive inquiries regarding accommodations understand the legal requirements and how to handle such requests (including whom to refer the requesting individuals to).
 - If you decide to adopt “flexible” policies providing accommodations for employees where no legal mandates exist, make sure that those policies are fairly and consistently applied, so that they do not result in disparate treatment of employees in a particular protected group.
 - Stress to all employees the importance of complying with the law and company policy on matters of discrimination, harassment, and accommodation, and clearly communicate any new policies to all employees.
 - Train managers and human resources staff on reasonable accommodation requests and how to consistently implement any new policies or practices.
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Prepare for a Perfect Storm of COVID-19 Whistleblower Claims

What Employers Should Do Now

- Have a return-to-work plan that follows the most recent guidance from the U.S. Centers for Disease Control and Prevention (CDC). As part of the implementation process, employers will want to decide how to communicate the plan to employees. If proper communication is not part of a return-to-work plan, companies may find themselves in a situation where employees refuse to return to work, claiming that working in an environment where COVID-19 is present poses a potential hazard and a health risk. If an employee makes such a claim, it may have implications under the federal Occupational Safety and Health Act and the National Labor Relations Act. In addition, these employees may remain eligible for unemployment benefits.
 - Before whistleblower claims arise, businesses should understand the risks of noncompliance and ensure they are compliant with all statutory and regulatory requirements. Shortly after the pandemic hit the U.S., many businesses were placed under duress and forced to make numerous critical decisions in a compressed time frame. Some of these decisions included applications for and receipt of pandemic aid and relief funding under the CARES Act. Nearly all of the aid and relief under the CARES Act required certain business representations to obtain funds, and also came with strings attached regarding the proper use of the funds and potential repayment. Businesses must take the time now to review their representations to the government and ensure their compliance protocols are current, accurate, and complete. Ensuring that businesses are compliant will help prevent future whistleblower claims.
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U.S. Government Assistance in Response to COVID-19: Investigations Are Coming

The CARES Act, accompanying guidance, and its loan applications and agreements contain numerous provisions that subject companies to potential oversight or enforcement risk. These include a series of certifications that a company must make as part of the application process, and legal requirements for administering the money.

We have seen this movie before. In 2008-09, America faced the Great Recession. Congress appropriated money to relieve the economic downturn, including the Troubled Asset Relief Program and the American Recovery and Reinvestment Act. These totaled about \$1.2 trillion, only one third of what has already been spent in 2020. The financial assistance led to significant oversight and enforcement activities by the U.S. Government, including investigations by the Justice Department and multiple inspectors general, highly publicized Congressional hearing, 300 defendants sent to prison, and \$11 billion in fines and disgorgement. This time may well be worse.

In addition to DOJ, every agency with responsibilities relating COVID-19 relief has its own internal watchdog in the form of an Inspector General, who is charged with investigating allegations of waste, fraud and abuse relating to the agency. These agency IG's are themselves already gearing up for COVID-19-related audits and investigations. In fact, the Small Business Administration has announced plans to audit all CARES Act loans worth over \$2 million and conduct spot check audits on others. In addition to the SBA, we can expect that IG's at Treasury and Health and Human Services, among others, will be active in this area. Indeed, Congress signaled its desire for agency IG oversight by appropriating \$140 million specifically for this purpose.

SBA Releases Loan Forgiveness Applications; Revised Interim Final Rule Implementing PPP Flexibility Act for Forgiveness

The Loan Forgiveness Application includes the following changes:

- Alternative Payroll Covered Period applies to the 24-week covered period. The Alternative Payroll Covered Period may not extend beyond December 31, 2020.
 - Clarifies one of the new FTE reduction exceptions: A position will not be included in the calculation if the Borrower made a good-faith, written offer to rehire an employee who was employee on February 15, 2020 and the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
 - Changes the documentation required for FTEs from the average number of FTEs per month to the average number of FTEs per week.
 - Specifies that employer health insurance contributions on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation should not be included in the health insurance expenditures calculation.
 - Specifies that employer retirement contributions on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation should not be included in the retirement expenditures calculation.
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SBA Releases Loan Forgiveness Applications; Revised Interim Final Rule Implementing PPP Flexibility Act for Forgiveness

The Alternative Loan Forgiveness Application is a shortened forgiveness application for the following borrowers:

- Self-employed, independent contractors, or sole proprietors with no employees;
 - Borrowers who did not reduce salaries by more than 25% during the covered period and did not reduce the number of employees or the average paid hours of employees from January 1, 2020 to the end of the Covered Period (ignoring reductions from the safe harbor related to an inability to hire qualified employees, and reductions due to an employee refusing to accept a restoration of hours); and
 - Borrowers who did not reduce salaries by more than 25% during the covered period and was unable to operate during the covered period at the same level of business activity due to COVID-19 related safety requirements promulgated by the CDC, HHS, or OSHA.
 - The Loan Forgiveness Application is available [HERE](#), and the instructions are available [HERE](#).
 - The Alternative Loan Forgiveness Application is available [HERE](#), and the instructions are available [HERE](#).
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If You Don't Think Doing Business In NY is Difficult Enough

On April 3, 2020, New York State Governor Andrew Cuomo signed into law a statewide Paid Sick Leave Law (the “Law” or “PSLL”). The PSLL is in addition to the mandatory COVID-19 Paid Sick Leave Law that was enacted on March 18, 2020.

The Law, which covers all employers in New York State, gives employees at least 40 hours of paid or unpaid sick leave up to a maximum of 56 paid hours, depending on the size and net income of the employer. The PSLL does not prohibit or prevent an employer from providing an amount of sick leave, paid or unpaid, in excess of the Law’s requirements.

- **Employers with 4 or less employees in a calendar year and a net income of \$1 million or less in the previous tax year:** Must provide each employee with at least 40 hours of unpaid sick leave each calendar year.
 - **Employers with 4 or less employees in any calendar year and a net income of more than \$1 million in the previous tax year:** Must provide each employee with at least 40 hours of paid sick leave each calendar year.
 - **Employers with between 5 and 99 employees in any calendar year:** Must provide each employee with at least 40 hours of paid sick leave each calendar year.
 - **Employers with 100 or more employees in any calendar year:** Must provide each employee with at least 56 hours of paid sick leave each calendar year.
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Consider Doing An Audit

- **Compliance.** Focuses on how well the organization is complying with current federal, state, and local laws and regulations.
 - **Best practices.** Helps the organization maintain or improve a competitive advantage by comparing its practices with those of companies identified as having exceptional HR practices.
 - **Strategic.** Focuses on strengths and weaknesses of systems and processes to determine whether they align with the HR department's and the organization's strategic plan.
 - **Function-specific.** Focuses on a specific area in the HR function (e.g., payroll, policy development, records retention).
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Questions?
