

Morgan Lewis

Employee Benefits and Executive Compensation Guidance Related to COVID-19

Morgan Lewis’s seven employee benefits and executive compensation substantive task forces are available to help employers evaluate and troubleshoot potential issues arising from the changing work environment and economic situation caused by the COVID-19 pandemic.

Please note that this guidance specifically addresses employee benefits and executive compensation issues. To the extent that other federal and state laws may come into play, such as paid sick leave laws, paid family and medical leave laws, privacy laws, the Americans with Disabilities Act (ADA), and others, employers should consult with employment counsel.

Employee benefits and executive compensation issues we have identified include:

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Health and Welfare Plan Design & Administration	<ul style="list-style-type: none">• HIPAA.• If an employer is notified that an employee has tested positive for COVID-19, either by the affected employee or a public health agency, is that information subject to the Health Insurance Portability and Accountability Act (HIPAA)?<ul style="list-style-type: none">○ No, the information in the employer’s possession is not subject to HIPAA because employers are not covered entities subject to HIPAA.<ul style="list-style-type: none">▪ However, the ADA still applies. The EEOC has advised that employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.▪ Employers should advise employees who were in close contact with the infected individual that they were in close contact with an individual who has tested positive for COVID-19, that they should contact their healthcare provider regarding next steps, that they not come to work for 14 days, that they should monitor themselves for symptoms, and that they should contact their healthcare provider if they develop any symptoms.• Does HIPAA prevent an employer from asking questions about symptoms or screening employee temperatures?<ul style="list-style-type: none">○ No. Employers are not covered entities under HIPAA. The EEOC has said such screens are permissible under the ADA in the time of pandemic, so long as the information is kept confidential.• Note: the group health plan generally is not permitted to share information with the employer under HIPAA.• HDHP/HSA. Can an employer provide COVID-19 testing and treatment at no cost-sharing to employees under its high deductible health plan (HDHP) without jeopardizing an individual’s Health Savings Account

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	<p>(HSA) eligibility?</p> <ul style="list-style-type: none"> ○ Yes, the Internal Revenue Service (IRS) released Notice 2020-15 which states that a health plan that otherwise satisfies the requirements to be an HDHP will not fail to be an HDHP merely because the health plan provides medical care services and items purchased related to testing for and treatment of COVID-19 prior to the satisfaction of the applicable minimum deductible. Therefore, individuals who receive these benefits at no cost-sharing will continue to be HSA eligible. ● Telemedicine. Does the IRS relief described above extend to telemedicine? <ul style="list-style-type: none"> ○ Yes, the IRS guidance in Notice 2020-15 can be read to extend to telemedicine services provided related to testing and treatment of COVID-19.
<p>Fringe Benefits & Payroll Tax</p>	<ul style="list-style-type: none"> ● Home-office expense reimbursement. A growing number of companies have imposed mandatory work-from-home policies for employees in cities where confirmed cases of COVID-19 have been reported. Voluntary extended telework arrangements have also increased dramatically in recent days. Often, however, personal residences are not adequately outfitted for employees to effectively perform their jobs remotely on a full-time, possibly long-term basis. Pending further guidance from the IRS, it is not clear whether certain home office expenses paid or reimbursed by employers will be excludable from income and wages under the tax code? ● Dependent care assistance. The number of weeks-long school district closures continues to rise, leaving parents with substantial additional and unexpected child-care costs. Families who opt for more in-home or private care assistance as a way to reduce an elderly or dependent family member’s exposure to large crowds will also generate substantial additional dependent-care expenses. Current law limits the amount of tax-free dependent care assistance employees may receive in each year, but statutory or regulatory relief may increase these limits. ● Employee leave donations. Office closures due to COVID-19 have placed a substantial economic hardship on many hourly workers who are only paid if they work. Additionally, individuals who contract COVID-19 may take many weeks to fully recover. For prior “disasters,” the IRS has provided relief to allow for employee leave donations on tax-favored basis. The IRS may do the same for the pandemic. <p>Read the comprehensive list of IRS relief recommendations Morgan Lewis submitted to the head of the IRS Office of Chief Counsel.</p>
<p>Retirement Plan Design & Administration</p>	<ul style="list-style-type: none"> ● Access to retirement funds; 401(k) plan loans and hardships. Participants who are adversely impacted by COVID-19 and who have emergency needs may seek access to their 401(k) accounts through a request for a hardship or plan loan. Retirement plan sponsors may want to consider communicating with participants regarding their 401(k) plan

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	<p>hardship and loan provisions, and/or coordinating with plan record-keepers to ensure that hardship and plan loan requests are timely processed. Existing hardship and loan eligibility and application requirements continue to apply unless and until Congress and/or the IRS modifies these rules.</p> <ul style="list-style-type: none"> <p>Communications with retirement plan participants in times of market volatility. Participants often become anxious about their retirement plan accounts during periods of extreme market volatility. Although diversification may protect accounts from losses when a single or even a few sectors are struggling, the market-wide downturns of the last few weeks leave participants with few places to hide. At times like these, retirement plans might consider working with their investment advisors and recordkeepers to remind participants that retirement plans are long-term investments that benefit from a long-term investment horizon. Although most of these communications would constitute non-fiduciary investment education, consideration should be given to having ERISA counsel review and advise on anything being sent to retirement plan participants.</p> <p>Mid-year reduction or suspension of 401(k) safe harbor contributions. Employers whose business operations are severely impacted by COVID-19 may face significant financial challenges and the need to cut costs. One possible source of savings could be the reduction or suspension of 401(k) safe harbor contributions. A mid-year reduction or suspension of safe harbor contributions is permitted in connection with an economic loss and, even in the absence of an economic loss, upon 30-day advance notice to participants if the plan’s safe harbor notice included a statement that the employer might reduce or suspend safe harbor contributions during the year (this 30-day advance notice applies even if safe harbor contributions are reduced due to an economic loss). Needless to say, employers considering this step will also need to consider the impact of nondiscrimination testing on the 401(k) plan.</p>
<p>ERISA Fiduciary Duty</p>	<ul style="list-style-type: none"> <p>Discussions with investment managers. Consider due diligence questions for your investment managers that ask what business continuity plans are in place to be able to continue to manage the plan’s assets during times of disruption due to the pandemic and the effect of the pandemic on markets. Other potential questions could include whether key personnel are still able to meet their obligations to the manager, whether tax reporting will be delayed, whether the market volatility requires adjustments to investment guidelines and, for fund investments, whether purchases, redemptions, and valuations have been suspended due to these disruptions. For those managers holding assets outside of the United States, have changes in regulations or operations in those markets affected the plan’s investments?</p> <p>Implications for fiduciary committees. ERISA’s emphasis on procedural prudence may never be more important than in times of social and financial turmoil. Thus, despite the challenges, fiduciary committees should not lose focus on appropriate procedures even if</p>

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	<p>meetings must be held remotely. Investment decisions made during this difficult time may be especially ripe for second-guessing by plaintiffs or regulators, so the ability to demonstrate a prudent process amid the storm will be very valuable.</p> <ul style="list-style-type: none"> • Implications for the 401(k) investment lineup. While many 401(k) participants are investing with the long view, current market disruptions can have an outsized effect on participants nearing retirement. Fiduciary committees may wish to engage with their consultants and other advisers to evaluate how their investment menu, and especially target date funds, are doing with respect to near-retirement participants.
<p>Executive Compensation</p>	<ul style="list-style-type: none"> • Deferred elections/accelerated distributions. Participants may seek to cancel deferral elections or receive accelerated distributions from nonqualified deferred compensation plans. Employers should confirm that existing plan and Section 409A requirements are satisfied before participants are permitted to take such action. This will likely require individual facts and circumstances determinations as to whether an “unforeseeable emergency” has occurred under the Section 409A regulations, which is a high standard. The tax consequences of a Section 409A violation are significant, so the plan should tread carefully in this context. Further, any distributions on account of an unforeseeable emergency are limited to the amount necessary to address the emergency, and corresponding taxes on the accelerated payment. We have suggested to the IRS that they waive the Section 409A excise tax on early distributions to individuals affected by COVID-19, or that the IRS deem distributions to individuals affected by COVID-19 to be on account of an “unforeseeable emergency.” However, at this time, this relief has not been granted. • Economic consequences. <ul style="list-style-type: none"> ○ Some companies are considering measures to conserve corporate cash in connection with executive compensation programs. For example, companies may consider whether the equity plan and grant agreements allow the company to switch from share withholding to “sell to cover” or cash for tax withholding for equity grants. Any consideration of this change requires evaluation of tax and securities law issues. ○ If layoffs are planned, companies should review their severance plans and policies to make sure they meet appropriate ERISA requirements. They should also consider any Section 409A implications as to whether a separation from service has occurred and the requirements of the six-month delay must be met for anyone who is a “specified employee” receiving deferred compensation on account of the separation from service. ○ If the stock market volatility continues, questions will arise as to whether stock options can be repriced. Most public company equity plans now require shareholder approval of any option repricing, and shareholder scrutiny may limit the advisability or scope of any repricing. For private companies, considerations around the valuation of the company will need to be taken into account,

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	including whether the most current valuation is an accurate valuation.
Multiemployer Plans	<ul style="list-style-type: none"> • Sick leave. <ul style="list-style-type: none"> ○ Contributing employers to multiemployer plans may want to consider whether any of the multiemployer welfare plans to which they contribute are in a position to provide sick leave benefits to workers who are not able to work due to COVID-19; and in particular, whether and how these benefits may allow such employers to satisfy the paid sick leave requirements that may soon become law under federal COVID-19 legislation. ○ Contributing employers to multiemployer funds will need to analyze whether paid sick leave or other paid time off that is provided specifically in response to COVID-19 is pay for which contributions are required to the multiemployer funds under the employers’ collective bargaining agreements. ○ Multiemployer welfare plans that are considering providing paid sick leave benefits should consider whether they will need to implement new systems to address the applicable tax withholding and reporting requirements associated with payment of wages on behalf of the contributing employers. If the plans don’t already have these systems in place, the administrative costs to implement such systems may make offering these benefits imprudent. We can advise on these tax reporting considerations. ○ Multiemployer welfare plans that are considering providing paid sick leave benefits should also consider whether providing these benefits under the plan will entitle the plans to receive the employer tax credits and other federal funding for employers that will likely be available to pay for required leave benefits. If such tax credits or other federal funding will not be available to plans, then it may not be prudent for plans to offer these benefits. • Operational matters. <ul style="list-style-type: none"> ○ Multiemployer funds in general will need to consider how best to maintain their operations during the next several weeks. Given the need, from a safety and employee relations perspective, to require or allow for remote work, this may be a particularly difficult period for welfare funds to administer claims in house. Such funds will likely need to ensure that certain basic office functions, including claim payment and member services, remain functioning. We can advise on the labor, employment, and benefits issues that arise when planning for these considerations. ○ Multiemployer plans that have upcoming Board of Trustee meetings should strongly consider whether it is prudent to hold such meetings in person, or whether a telephonic or video-based meeting would be preferable. Trust agreements should be reviewed to confirm that such telephonic or video-based meetings are permitted, and whether there are any different procedural rules that apply. In some cases, if the restrictions are onerous, trust agreements may need to be amended to provide for additional flexibility to hold remote

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	meetings.
ESOPs	<ul style="list-style-type: none"> • Communications issues. Specific to Employee Stock Ownership Plans (ESOPs), most companies have experienced very good growth in their stock fund for several years now. Because of the impact on COVID-19, plan sponsors should leap ahead of the curve to issue a proper notification to employees to balance expectations for possible dips in the valuation because of the potential negative economic impact. This is especially important for clients on fiscal years that will be ending soon, such as in April or May, where valuations will be prepared in the next few months. • Amending distribution provisions. Specific to ESOPs, several companies have only lump sum distributions as their method of distribution. Due to economic concerns and possible cash flow issues, companies may have a difficult time meeting these obligations. Companies in this situation should consider amending their ESOPs to allow the company sponsor to have a choice to make either a lump sum or installment distributions over five years. • Valuations. Most ESOP plans are on a calendar year and, as such, the valuations for distributions taking place in 2020 (which generally will start in a few months) are based off the company’s performance as of December 31, 2019 (before the impact of the COVID-19 kicked in). Many clients will need to have this issue addressed and understand what the possibilities of performing an interim valuation are from an ERISA and tax code standpoint.