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# NAVIGATING THE NEXT.

## Managing the Workforce in Light of COVID-19: What's Next for Hospitals and Health Systems

Robert Abramowitz, Susan Feigin Harris, Howard Young,  
Jonathan Zimmerman, and Daniel Kadish

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# Presenters



**Robert Abramowitz**  
Philadelphia  
Employee Benefits



**Susan Feigin Harris**  
Houston  
Healthcare Litigation



**Howard Young**  
Washington, DC  
Healthcare Litigation



**Jonathan Zimmerman**  
Washington, DC  
Employee Benefits



**Daniel Kadish**  
New York  
Labor And Employment

**Morgan Lewis**

# Managing the Workforce in Light of COVID-19

Topics to be discussed today include



**COVID-19-Related Benefit Relief and Considerations**



**Preserving the Workforce: Key Considerations and Best Practices**



**Provider Relief Fund: Permitted Use and What's Next for Reporting**

# COVID-19-RELATED BENEFIT RELIEF AND CONSIDERATIONS



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# Suspension or Reduction of Employer-Paid Retirement Benefits Defined Contribution Plans

- Suspension or reduction of match, or converting from fixed formula to discretionary.
- Suspension or reduction of base contribution, or converting to discretionary.



## **NOTE:**

- **Potential issue of mid-year implementation for certain safe harbor plans**
- **Potential issues for executive (top-hat) retirement plans**
- **Potential need to bargain for changes affecting employees covered under a collective bargaining agreement (CBA)**

What is right period of advance notice to implement a change, and to reinstate prior formula?

# Suspension or Reduction of Employer-Paid Retirement Benefits Defined Benefit Plans

- Suspension of accruals entirely.
- Suspension of service credits but continued adjustments to pay under a final average pay formula.



## **NOTE:**

- **Need for 204(h) notices at least 45 days in advance of effective date, and potential CBA issue**

# Benefit Implications of Pay Cuts

- Note potential impact on pay-related benefits, including LTD and life insurance, and whether special communications, plan amendments, or vendor contract changes are needed.
- Check executive agreements – a pay cut may be a trigger for a termination on account of “good reason.”



## **NOTE:**

- **Any CBA issues**

# Benefit Implications of Furloughs and Cutbacks in Hours

- What benefits will be impacted, and consider if special communications, plan amendments, or vendor contract changes are needed.
- If full furlough without pay continuation, how will employee cost-sharing be handled for benefits that are continued.
- Check severance plan, to avoid inadvertent trigger.



## **NOTE:**

- **Any CBA issues**

# CARES Act Retention Credit

The CARES Act provides a tax credit of up to \$5,000 per employee, for wages and health benefits provided to employees who are not working because of a government-ordered shutdown or a decline in gross receipts.

Healthcare organizations are more likely to qualify based on a decline in gross receipts, and may qualify even if tax-exempt

Employers that take PPP loans are not eligible for this credit.

Future stimulus legislation may expand this credit.

The credit may be claimed in arrears by filing amended employment tax returns.

Organizations claiming the credit should document the basis for the claim.

# Voluntary Early Retirement Plans

- Potentially attractive way to reduce headcount and reconfigure workforce.
- Targeted population typically based on age and years of service, with a requirement the employee sign a release of claims to obtain the enhanced benefits.
- Typically uses defined benefit plan to provide extra years of service and an enhanced early retirement subsidy (potential DOL issue if severance plan is delivery vehicle).

## NOTE:



- **Potential need to bridge medical coverage to age 65 as part of plan design. May require changes to active medical and any retiree medical plans.**
- **Timing and disclosure requirements for releases that are intended to cover ADEA claims**
- **Any CBA issues**

# Voluntary/Involuntary Reduction in Force

- Typically provides salary continuation under a severance plan.
- Often provides enhanced benefit continuation (COBRA health care continuation is a floor).



**NOTE:**

- **Timing and disclosure requirements for releases that are intended to cover ADEA claims**

# Qualified Disaster Relief Payments

## Code section 139, aka Stafford Act

- Allows reimbursements or payments for “reasonable and necessary personal, family, living or funeral expenses” due to an eligible disaster
- Tax-free to employees, deductible to employer
- IRS implied that Section 139 can apply to coronavirus payments in its guidance on payroll tax credits on March 31

## Little guidance, so use caution if contemplating re-characterizing existing or wage-like benefits

- No double-dipping – only payments beyond what is available under another tax break
- Example: Childcare expenses

## No substantiation requirements

- Likely to be IRS attention later, however, so consider setting up a policy and requesting records of eligible expenses

# Upcoming Challenge – 2021 PBGC Premiums

## The Problem



The flat rate premium increases in 2021 to \$16 per participant (currently \$15).

The variable rate premium increases to 4.6% of the plan's unfunded vested benefits (currently 4.5%).

The headcount cap on the premium increases to \$582 per participant (currently \$561).

Interest rates for calculating 2021 plan liabilities are trending lower, increasing plan liabilities and reducing funded status.

# Upcoming Challenge – 2021 PBGC Premiums

## Possible Approaches



### APPROACH 1

Shrink number of participants (e.g., check if mandatory cash-outs are up to date; address missing participants who have reached normal retirement age; consider a lump sum windows for deferred vested participants; consider annuity lift-out with an insurer).



### APPROACH 2

Potential election of Alternative Premium Funding Target - review with actuary whether election is available, and if so, short term and long term impact.



### APPROACH 3

Make additional contributions – eliminating the risk based premium is an ongoing benefit that may make strategies of using borrowed funds or endowment financially attractive.

# **PRESERVING THE WORKFORCE: KEY CONSIDERATIONS AND BEST PRACTICES**



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# The COVID-19 Playbook – What's Different?



## "OLD" PLAYBOOK

1. Separations used to be bad

## THE COVID-19 PLAYBOOK

Now (often) separations are required and may have less stigma, for the employer and employee

# The COVID-19 Playbook – What’s Different?



"OLD" PLAYBOOK	THE COVID-19 PLAYBOOK
1. Separations used to be bad	Now (often) separations are <u>required</u> and may have less stigma, for the employer and employee
2. Notice used to be required	Now everything happens <u>immediately</u>

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3. <u>One-size-fits-all</u> legal requirements	Now " <u>essential</u> " vs. " <u>non-essential</u> "
4. Biggest challenge: making good decisions and claim avoidance	Biggest challenge: <u>predicting</u> the future, <u>planning</u> for the longer term

# Pay Reductions, Furloughs, Layoffs, and Separations

- Employers are adjusting their workforce structure in every conceivable way, with a focus on flexibility
- Words have power: “furlough” vs. “layoff” vs. “separation” vs. “termination”
- Complex tradeoffs and questions arise from different actions:
  - Pay reductions
  - Work restructuring, work-at-home, hours’ reductions, and work-sharing
  - Fixed-duration layoffs/furloughs
  - Indefinite layoffs/furloughs
  - Employment separations/terminations
  - Relationships with contractors/contingent employees

# Workforce Change Alternatives

## Temporary furloughs with a definite return date

- Employees remain employed without pay
- Employer provides a definite return-to-work date within six months
- California: Return-to-work date within 10 days.

## Indefinite furloughs/layoffs

- Employees do not work and are not paid
- The time period of the furlough is unclear and not defined
- In general, indefinite furloughs with no pay are considered an employment termination event

## Pay and/or hours' reductions

- Employees remain employed and continue to receive health benefits
- Hours and/or hourly rate reductions for nonexempt employees
- Salary and/or work expectation reductions for exempt employees

# Temporary Furloughs (continuing “employment”)

- Requirement to **pay out final wages and/or accrued vacation/PTO**
  - Depends on state and policy
  - Check state requirements
    - California: after 10 unpaid days
- **Benefits paid by the state** (unemployment, disability, and paid family leave)
  - Depends on state
  - Make sure to inform employees of UI alternative and provide required UI notices
  - Provide employees with state-required information about each benefit
- **Employer Benefits** (dictated by plan terms – but check minimum hours’ requirements)
- Many employers are **paying employees while on leave** (or paying a **percentage** of wages) if possible to: (1) encourage reporting of symptoms; (2) support their workers; and (3) mitigate potential claims.
- Ultimately, this is a **business decision**, depending on the circumstances and degree of spread of COVID-19.

# Indefinite Furloughs/Layoffs

- With no definite return date and no pay, an indefinite furlough is a layoff
- Provide necessary WARN and state WARN-type notices if applicable
- Provide necessary state notices (other than WARN related) required on termination
- Sick leave
  - In most states, there is no obligation to pay sick leave if employment ends
  - However, strongly consider providing benefits before employment terminates
- **Vacation/PTO**
  - In some states accrued but unused vacation must be paid out
  - Where the employer's policy requires payout of vacation or PTO, then it should be paid out
- **FMLA and state mandated family and medical leave**
  - Generally allows termination if the adverse action would have occurred regardless of leave status
- Provide information about **state-sponsored benefits**
  - Unemployment; Disability; Paid Family Leave; and Workers' Compensation (if applicable)

# Hours and Pay Reductions

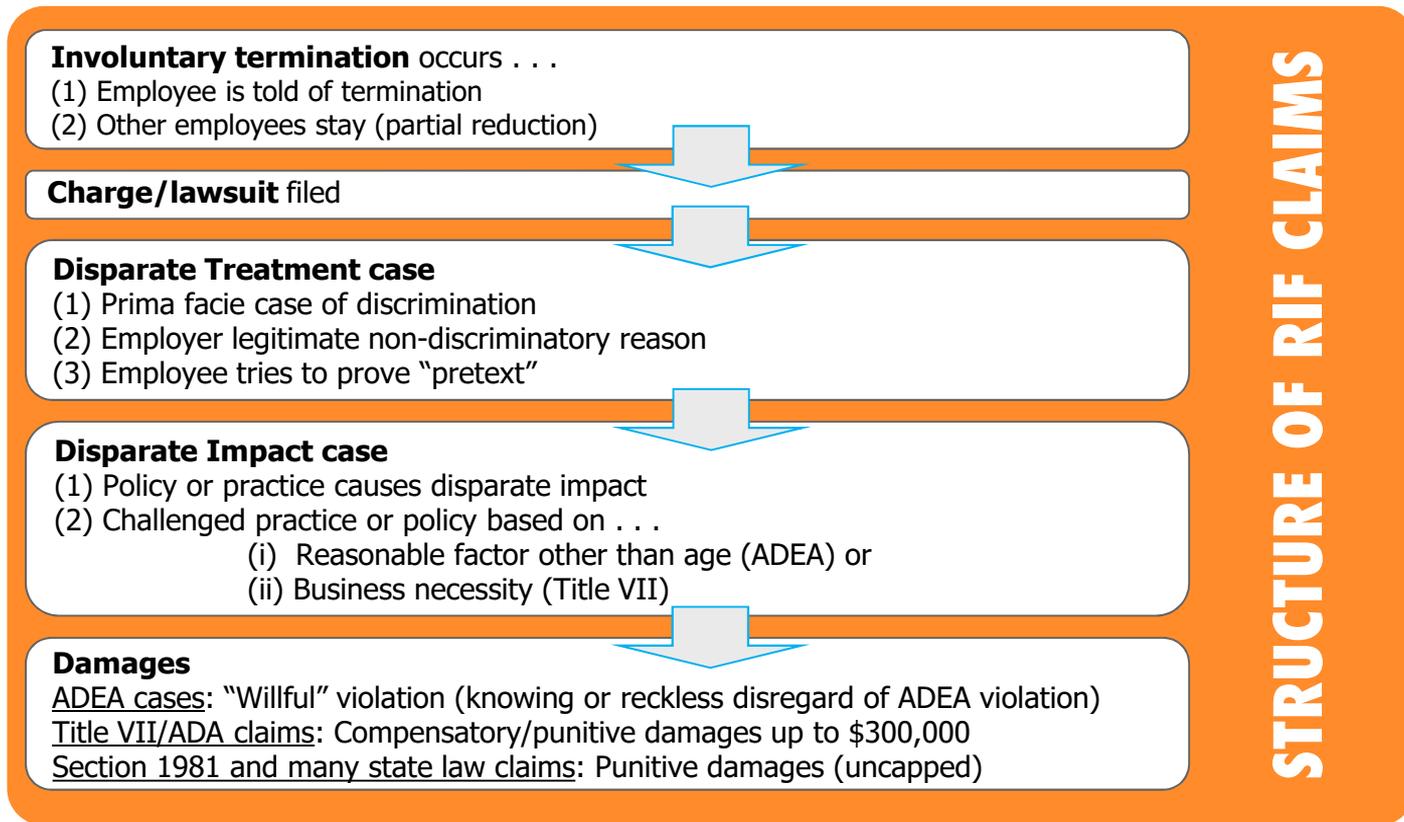
## ALL EMPLOYEES

- Hours' reduction of more than 50% may trigger WARN or Mini-WARN obligations
- Must allow sick leave for sick leave purposes (FFCRA benefits may apply)
- Must allow FMLA and state equivalent
- Vacation/PTO can be denied only if policies permit denial, and should be a last resort

## NONEXEMPT EMPLOYEES

- Must only receive pay for hours worked
- May be entitled to UI for hours or pay reduction, but only up to the state's maximum weekly benefit (eligibility varies from state to state)
- Provide as much notice as possible
- Remain aware of "reporting time" issues in many states
- Remain aware of obligations to compensate for certain "on-call" time
- Wellness surveys or temperature checks are likely not compensable in states that follow the Portal-to-Portal Act, but may be compensable time worked in some states

# How Workforce Change Leads to Litigation



# Recommended RIF Procedure

## Involuntary termination occurs . . .

- (1) Employee is told of termination
- (2) Other employees stay (partial reduction)

## Charge/lawsuit filed

## Disparate Treatment case

- (1) Prima facie case of discrimination
- (2) Employer legitimate non-discriminatory reason
- (3) Employee tries to prove "pretext"

## Disparate Impact case

- (1) Policy or practice causes disparate impact
- (2) Challenged practice or policy based on . . .
  - (i) Reasonable factor other than age (ADEA) or
  - (ii) Business necessity (Title VII)

## Damages

ADEA cases: "Willful" violation (knowing or reckless disregard of ADEA violation)

Title VII/ADA claims: Compensatory/punitive damages up to \$300,000  
Section 1981 and many state law claims: Punitive damages (uncapped)

STRUCTURE OF RIF CLAIMS

RECOMMENDED RIF PROCEDURE

## RIF Planning

**RIF Procedure** (written): think "Exhibit A"

## Mgmt Communications/Training

**Employee/Public Communications**: think "Exhibit A"

**Volunteers** (optional)

## Tentative Selections

## Higher Level Management Review

**Finalize Selections-Documentation**: think "Exhibit A"

**Employee/Public Communications**: think "Exhibit A"

## Post-Announcement Implementation

## Also Watch For . . .

- (1) **Unions** (CBA and bargaining; NLRB; organizing)
- (2) **Deals/sales/outsourcing etc.** (more complicated)

# The COVID-19 Playbook – Workforce Changes

## 1. RIF-RELATED ALTERNATIVES

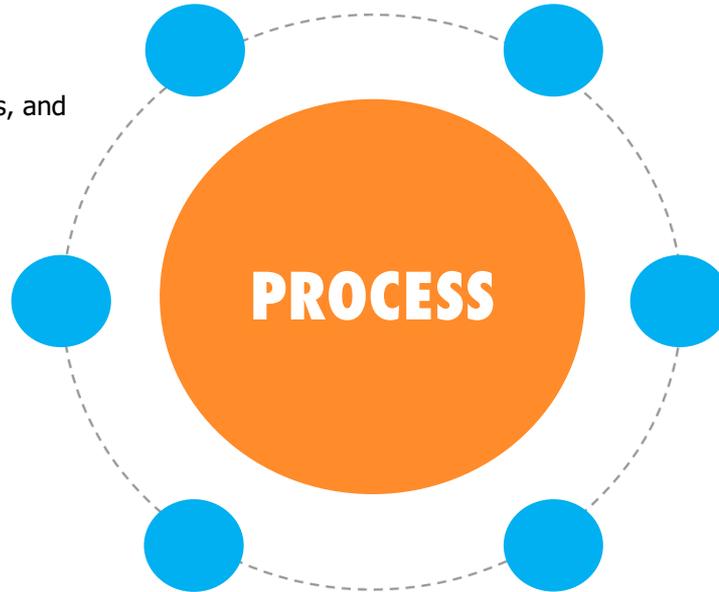
- Voluntary furloughs
- Voluntary separation programs
- Hiring freeze/attrition
- Hours reductions
- Eliminate contract employees, temps, and contingent workers

## 2. RIF PROCEDURE

- Anticipate potential claims
- Nondiscriminatory criteria
- Documentation
- Multiple layers of review

## 3. SELECTIONS AND TRAINING

- Training for managers/supervisors
- Tentative selection decisions
- Narrative explanations for tentative selection decisions
- Senior management review



## 4. ADVERSE IMPACT ANALYSIS LEGAL REVIEW

- Privileged in-house/outside counsel review of selections
- Adverse impact analysis
- More potential decision-making about selections

## 5. WARN NOTICES AND BARGAINING

- WARN analysis conducted
- 60-day WARN notices issued
- Potential state WARN-type laws
- Union decision and/or effects-bargaining (if employees are unionized)

## 6. SEVERANCE PAY / RELEASES

- Review of benefit plan(s)
- Review/refine waivers/releases  
OWBPA compliance
- COBRA notices

# COVID-19 Vaccine and Healthcare Workforce



**It's Almost Here for Frontline Healthcare Workers –**

<https://www.morganlewis.com/pubs/2020/11/covid-19-vaccines-considerations-for-us-employers-cv19-lf>



## Vaccine Safety Concerns

Can you require your essential staff to take the vaccine?



## Yes, probably, but . . .

with exceptions. This is not a new issue – religious objectors and people with health concerns have refused other vaccines and their choice is protected under laws protecting disabilities (ADA) and religious rights (Title VII of Civil Rights Act). Many healthcare employers will opt for encouraging its workforce to take the vaccine. Understand “reasonable accommodations.”

Check out state laws as well as they vary.

# PROVIDER RELIEF FUND: PERMITTED USE AND WHAT'S NEXT FOR REPORTING



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# Coronavirus Aid, Relief, and Economic Security Act (CARES Act)



## CARES Act created the Public Health and Social Services Emergency Fund

"Provider Relief Fund"- to reimburse hospitals, physicians and others for "healthcare related expenses or lost revenues that are attributable to coronavirus"



**\$100 Billion**



## Paycheck Protection Program and Health Care Enhancement Act – known as CARES 3.5



**+ \$75 Billion**

To the Provider Relief Fund

## Provider Relief Fund (PRF) Dollars

Initially deposited in provider bank accounts April 10<sup>th</sup> without any application

HHS issued 10 pages of Provider Fund Payment Terms and Conditions *subsequent to the unexpected distribution*

# PRF Dollars - General Distribution



## **\$50 B - PHASE 1**

- Allocated to Medicare FFS providers proportional to their share of 2018 patient revenue
- Two rounds – Apr. 10 & 24
- Application deadline = June 3



## **\$18 B - PHASE 2**

- Allocated to Medicaid / CHIP providers, Medicaid managed care plans, dentists and certain other providers including Medicare providers that missed the Phase 1 distribution
- Application deadline = Sept. 13



## **\$20 B - PHASE 3**

- Allocated to providers that have already received PRF funding based on financial losses / changes caused by the coronavirus; includes certain previously ineligible providers (e.g., new practices)
- Application deadline = Nov. 6

# PRF Dollars – Targeted Distribution

RECIPIENTS	AMOUNT	DATE
Hospitals in High Intensity / High Impact COVID Areas	\$12 B, \$10 B	May 7, July 17
Rural Providers Specialty Rural Providers (urban w/ rural designation, small metro)	\$10.2 B \$1.1 B	May 6 July 10
Skilled Nursing Facilities (Aug. 17 - \$2.5 B includes nursing homes)	\$4.9 B, \$2.5 B	May 22, Aug. 17
Tribal Hospitals, Clinics and Urban Health Centers	\$500 M	May 29
Safety Net Hospitals	\$10.3 B, \$3 B	June 9, July 10
Freestanding Children’s Hospitals	\$1.4 B	Aug. 14
Nursing Homes (1 <sup>st</sup> round of performance payments)	\$333 M	Oct. 28
Uninsured COVID-19 Patients - Reimbursement may be available for testing, treatment, and vaccine administration for uninsured individuals with a COVID-19 primary diagnosis	Subject to available funding	Patient services on/after Feb. 4



**\$50 B AVAILABLE FOR DISTRIBUTION – MUST APPLY – NO DEADLINE**



## PRF Dollars – Eligibility



Signing attestation and accepting the Terms and Conditions

Submitting tax documents and financial loss estimates to be eligible for additional funds; 2% of annual patient revenue became benchmark

HHS extended the time period to submit reports on use of PRF; Feb. 15, 2021 is first report deadline; if all PRF used in 2020, only that single report is due; if PRF is used past Dec. 31, a second and final report is due July 31, 2021

## PRF Dollars – Certification

**“Payment will only be used to prevent, prepare for, and respond to coronavirus and that the Payment shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus”**

**Payment will not be used to “reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse”**

## PRF Dollars – Reporting

- Reporting data elements now set (if PRF over \$10,000)
  - As of Oct. 22 - HHS changed controversial views on lost revenues
    - HHS had proposed in Sept. - negative change in year-over-year **net patient care operating income** revenue / net charges
  - HHS reversed course
    - Accepts lost revenue as “negative change in year-over-year actual total revenue / net charges from patient care related sources”
  - Nov. 2 update & corresponding FAQs
    - Clarifies that expenses related to coronavirus do not need to be netted against patient care lost revenue
- Report other assistance
  - PPP, FEMA, CARES Act testing, business insurance, etc.
- Expense attributable to Coronavirus
  - Enhanced expense (G&A) reporting for recipients of PRF over \$500,000 in the aggregate
  - Ensure that expenses are over and above what has been reimbursed by other sources
- Non-financial data collected on a quarterly basis
  - Facility, staffing, patient care
- Subject to Single Audit requirements
  - If expend \$750K or more



# PRF – Traps for the Unwary



Some believe the distribution of the initial tranche of funding was flawed given the automated deposit mechanism and conflicting language with the statutory language of the CARES Act

Application was to be submitted “justifying the need of the provider for payment”

HHS eventually “fixed” the Terms and Conditions

Dollars must not be used to reimburse expenses/losses that have been reimbursed from other sources, or that other sources are obligated to reimburse

What does it mean for an “other source” to be “obligated to reimburse” expenses or losses in the future?

- In the case of insurance proceeds, this may be unknowable for months or years, long after relief funds are spent

Are providers expected to give Provider Relief Funds back if an “other source” is identified later?



# QUESTIONS?

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# Thanks and Be Well!



## **Robert Abramowitz**

Philadelphia

[robert.abramowitz@morganlewis.com](mailto:robert.abramowitz@morganlewis.com)

+1.215.963.4811

Bob counsels clients on employee benefits matters, including fiduciary requirements under the Employee Retirement Income Security Act (ERISA), qualified pension and profit-sharing plans, and executive compensation issues. Bob also advises on matters related to flexible compensation programs, health and welfare plans, retiree health plans, and managed healthcare programs. He has experience representing clients in proceedings before the US Internal Revenue Service (IRS), US Department of Labor (DOL), and the Pension Benefit Guaranty Corporation.

# Thanks and Be Well!



## **Susan Feigin Harris**

Houston

[susan.harris@morganlewis.com](mailto:susan.harris@morganlewis.com)

+1.713.890.5733

Named Texas' 2018 Lawyer of the Year, Susan concentrates on the regulatory, business, corporate, governance, compliance, and contracting needs of a diverse group of healthcare clients. She regularly addresses federal and state healthcare regulations, and works with state and federal healthcare agencies involving Medicare and Medicaid licensing, certification, reimbursement, compliance, enforcement, and recoupment actions. Susan's clients include hospitals, physician groups, lab companies, post-acute providers, and healthcare innovations companies.

# Thanks and Be Well!



## Howard Young

Washington, DC

[howard.young@morganlewis.com](mailto:howard.young@morganlewis.com)

+1.202.739.5461

A nationally recognized leader in healthcare fraud and abuse and regulatory issues, Howard leads the Morgan Lewis healthcare practice and co-leads the firm's healthcare industry initiative. Howard advises a range of healthcare clients on government investigations and audits, litigation, regulatory, and transactional matters. Healthcare organizations turn to Howard to address their most critical legal, compliance and strategic business issues and to assist with internal and government investigations, qui tam litigation, OIG inquiries, and self-disclosures. Howard regularly advises investors, including private equity firms, on transactions, affiliations, and joint ventures to create effective legal solutions.

# Thanks and Be Well!



## **Jonathan Zimmerman**

Washington, DC

[jonathan.zimmerman@morganlewis.com](mailto:jonathan.zimmerman@morganlewis.com)

+1.202.739.5212

Jonathan helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on Internal Revenue Code and Employee Retirement Income Security Act (ERISA) compliance for retirement, health and welfare, and executive compensation plans. He has particular experience with Code Sections 409A, 162(m), and 280G, and with taxes and fees arising under the Affordable Care Act (ACA). Jonathan also devotes a large part of his practice to payroll, withholding, and fringe benefits matters. He works with clients of all sizes and routinely handles matters ranging from large transactions to day-to-day administrative questions.

# Thanks and Be Well!



## **Daniel Kadish**

New York

[daniel.kadish@morganlewis.com](mailto:daniel.kadish@morganlewis.com)

+1.212.309.6328

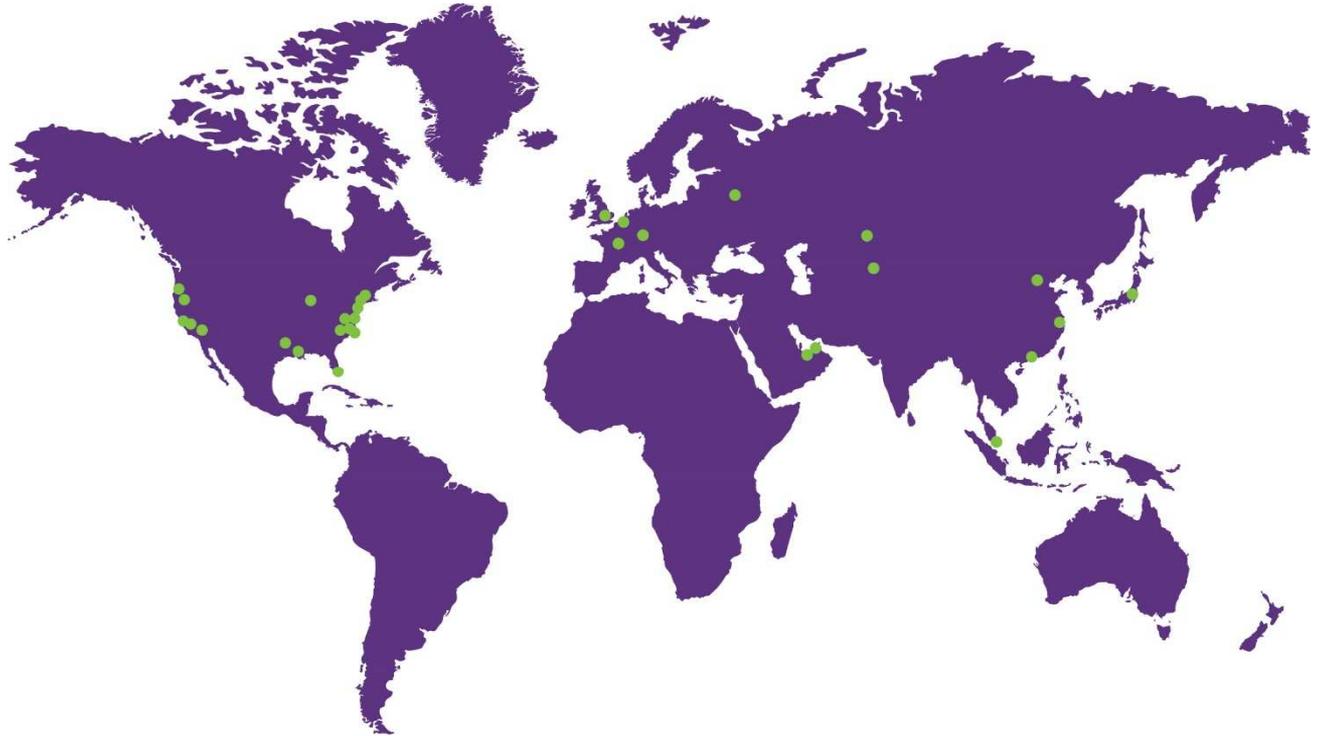
Daniel represents and counsels employers facing employment disputes and has been a leader on Morgan Lewis' COVID-19 compliance and counseling team. He litigates complex employment matters, including class and collective actions, before US federal and state trial courts and administrative agencies, the Financial Industry Regulatory Authority (FINRA), and the American Arbitration Association. Daniel works with his clients to defend wage and hour litigation, discrimination, harassment, retaliation, wrongful discharge, and breach of contract claims.

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