

Coronavirus Laws and Your Dealership: Part IV

June 16, 2020

Brian Maas, CNCDA President

Anthony Bento, CNCDA Director of Legal Affairs

John Boggs, Fine, Boggs, and Perkins LLP



THANK YOU SPONSORS



■ DIAMOND SPONSOR




■ PLATINUM SPONSOR





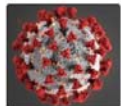
What are we covering today?

1. Current Status of Dealership Operations
2. PPP Loan Forgiveness Guidance Update
3. Employment Law Issues and Answers

A black and white photograph of a wooden gavel resting on a wooden surface. In the background, several open books are visible, suggesting a legal or educational setting. The gavel is positioned diagonally, with its head resting on the surface. The text is overlaid on the gavel's head.

This presentation is intended for educational purposes and is not legal advice. This presentation is designed to provide a brief overview of many recent legal developments. For legal advice specific to your dealership, contact competent counsel.

Free Online Resources for CNCDA Members

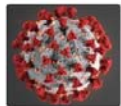


Coronavirus Webinars

JUNE 3, 2020 | CORONAVIRUS RESOURCES

View recent webinar recordings

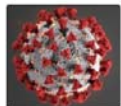
[READ MORE →](#)



COVID-19 Member Toolkit

MAY 13, 2020 | CORONAVIRUS RESOURCES

[READ MORE →](#)

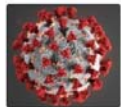


Coronavirus Documents

JUNE 1, 2020 | CORONAVIRUS RESOURCES

Access key documents regarding coronavirus compliance.

[READ MORE →](#)



Dealership Coronavirus FAQs

JUNE 8, 2020 | CORONAVIRUS RESOURCES

View more coronavirus resources

[READ MORE →](#)

LICENSED VENDOR

Armatus

With over 6,000 approved submissions with 28 manufacturers in 49 states, Armatus Dealer Uplift is the industry leader specializing in Retail Warranty Reimbursement submissions. Armatus' proprietary software and data management techniques offer clients the only true mark-up and labor rate optimization process in the market. The Armatus team has extensive retail automotive experience, superior knowledge of manufacturer protocols, and has provided the framework for 10 retail warranty reimbursement statutes. The Maryland-based company is exclusively licensed by CNCDA for Retail Warranty Reimbursement services.



Legal Updates

To receive copies of documents and any legal advice letters, to be emailed to you free of charge, you must enter your information and verify that you are a client of Fine, Boggs & Perkins LLP, a current user of HR Hotlink and/or a member of the California New Car Dealers Association, the California Motorcycle Dealers Association, the California Auto Body Association or the California Recreational Vehicle Dealers Association.

If you have previously registered, you can [login here](#)

For assistance, please call 650.712.8908

First Name:

Last Name:

Name of Business:

Email:

☐ I hereby verify that I am an authorized recipient as set forth above and understand that the electronic mail transmission, including any attachments, which I am requesting is attorney-client privileged and confidential and is intended only for the review of the party to whom it is addressed and who is an authorized recipient as stated above. The email and the attachments you receive should be treated in a confidential manner and/or constitutes a writing reflecting an attorney's impressions, conclusions, opinions, and/or legal research or theories which may be protected by the attorney work product doctrine. If you receive any unauthorized transmission, do not read it. Unintended transmission shall not constitute a waiver of the attorney-client and/or attorney work product privileges.

[REGISTER NOW](#)

<https://www.cncda.org/dealer-coronavirus-resources/>

<https://www.employerlawyers.com/legal-updates/>

CNCDA COVID-19 Member Toolkit

- ▶ Contains many helpful resources on issues discussed in this webinar
- ▶ Available on CNCDA Comply

MEMBER TOOLKIT



Restarting California's New Car Dealerships in the Wake of COVID-19

OVERVIEW

This CNCDA Member Toolkit is designed to help dealerships implement new protocols and procedures, ensuring the health and safety of consumers and employees, in the wake of the COVID-19 crisis. This document is not intended as legal advice, nor is it intended to be comprehensive regarding all COVID-19 compliance matters. Instead, this toolkit is designed as an informational checklist, which includes key resources for critical areas that dealerships need to be aware of as they reopen to the public and begin to resume day-to-day operations. Dealers should also note that while CNCDA intends to use its best efforts to update this document, COVID-19 compliance issues continue to change quickly. For legal advice, contact competent counsel.



Key Resources

- State of California – [Industry Guidance and Checklist on Auto Dealership COVID-19 Operations](#)
- Cal/OSHA – [Guidance on Requirements to Protect Workers from Coronavirus](#)
- Centers for Disease Control and Prevention (CDC) – [Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19](#)

GENERAL REQUIREMENTS

- ✓ Designate someone at your dealership that is responsible for COVID-19 health and safety compliance.
- ✓ Purchase equipment necessary to comply with health requirements (e.g., face masks, touchless body thermometers, hand sanitizers, disinfectant wipes, etc.).



Part 1 STATUS OF DEALERSHIP OPERATIONS

Current status of dealership operations

- ▶ Service and Parts Departments — permitted in all jurisdictions
- ▶ Vehicle Sales — Resuming in-person sales operations in most jurisdictions
 - ▶ The statewide order allows in-person vehicle sales, but dealers must adhere to health guidance (discussed later).
 - ▶ Most counties are allowing dealers to open showrooms and sales lots, albeit subject to social distancing protocols and other operational requirements
- ▶ Not Business as usual. Many new requirements and restrictions.

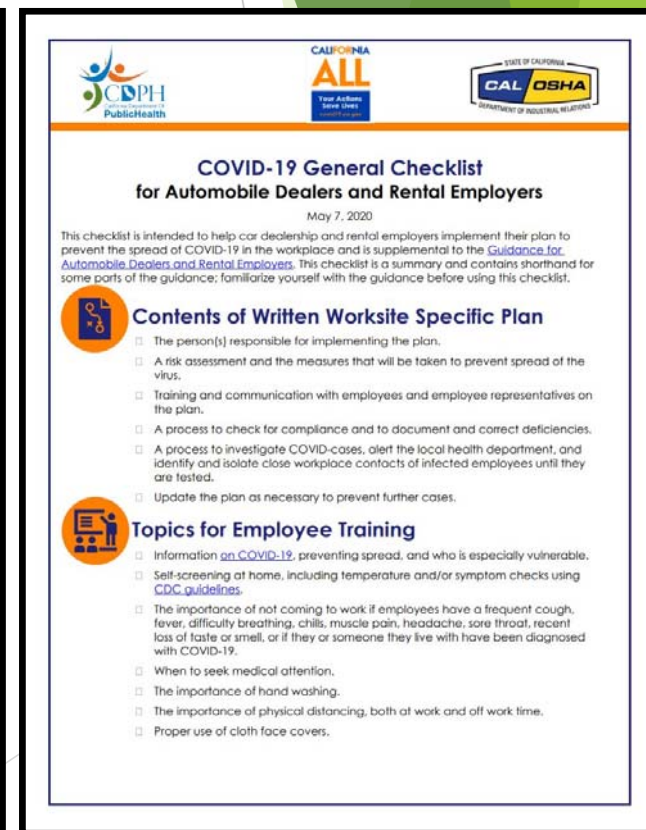
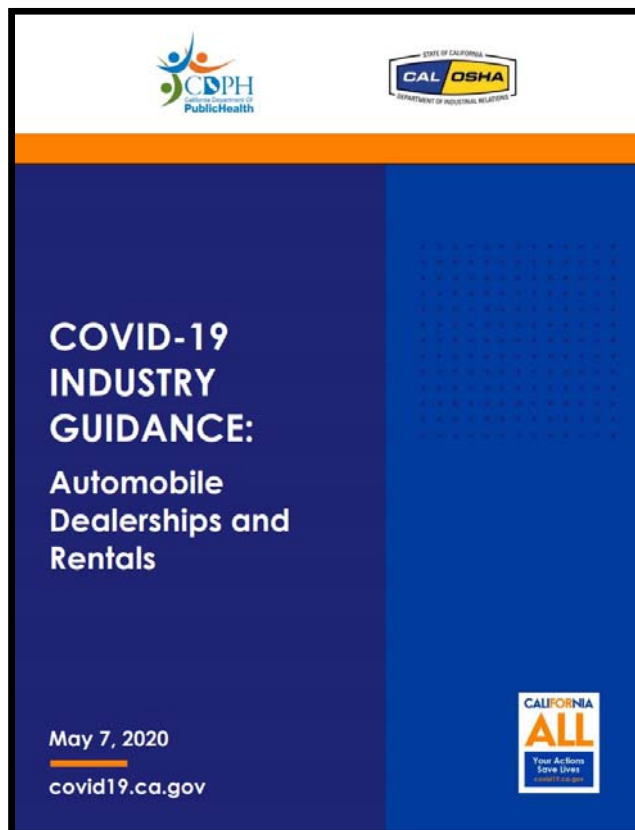
Major Local Exceptions

► Bay Area

- Most Bay Area jurisdictions now allow in-person vehicle sales at dealership showrooms, so long as state and local health requirements are observed:
 - Contra Costa County – June 2
 - San Francisco – June 13
 - Santa Clara County – June 5
 - Marin County – June 12
 - City of Berkeley – June 12
- Awaiting updated order to allow in-person retail sales
 - Alameda County

Statewide COVID-19 Industry Guidance and Checklist: Automobile Dealerships and Rentals

- ▶ Issued May 7, 2020 by State Department of Public Health and Cal/OSHA
- ▶ All dealerships in California should review the guidance and post a copy of the corresponding checklist.
- ▶ <https://covid19.ca.gov/industry-guidance/>



DMV Memo on Online Sales

- ▶ DMV outlined compliance requirements for online vehicle sales and off-site deliveries. ([OLIN 2020-04](#))
- ▶ Dealers engaging on online sales and/or off-site deliveries are strongly encouraged to review the two-page DMV memo.
- ▶ Mirrors guidance CNCDA previously issued in memo on online sales by Arent Fox LLP (available on CNCDA Comply)



Occupational Licensing Industry News

OLIN 2020-04

Online Vehicle Sales and Off-Site Delivery

DIGITAL INFORMATION BRANCH • CUSTOMER SERVICES DIVISION • © 2020 STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES. ALL RIGHTS RESERVED.

Effective Immediately

Purpose

Due to the COVID-19 outbreak, a *Proclamation of a State of Emergency* was issued by California Governor Gavin Newsom. On March 19, 2020, Executive Order N-33-20 was issued which exempted from the stay at home order “essential critical infrastructure workers” needed to maintain continuity of essential critical infrastructure designated by the State Public Health Officer.

On April 28, 2020, in accordance with the Order, the State Public Health Officer designated workers critical to the manufacturing, distribution and sales of vehicles as essential critical infrastructure workers, subject to adhering to the public health guidelines issued by the California Department of Public Health (CDPH).

This memorandum clarifies the requirements for online vehicles sales and off-site delivery of a vehicle to a purchaser during this outbreak period.

Online Sales Transactions and Off-Site Vehicle Delivery

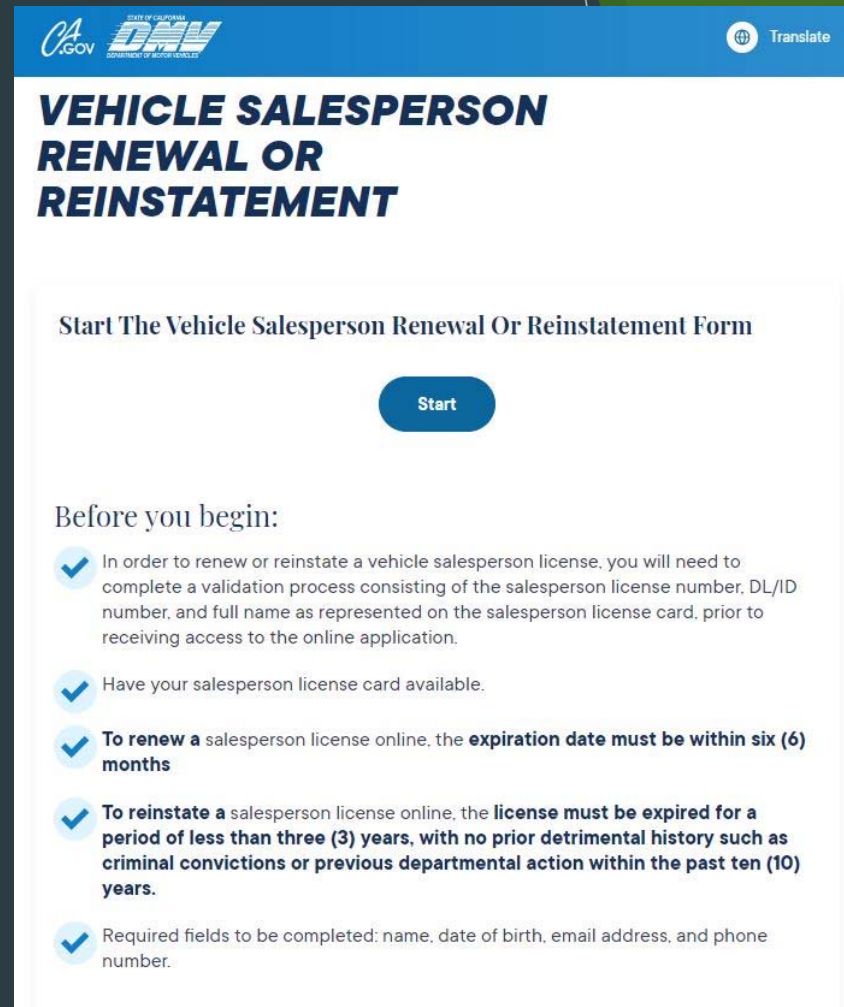
The *Vehicle Code* (VC) requires vehicle sales be conducted through a licensed location. This requirement applies to brick and mortar vehicle dealerships transactions and to online sales transactions conducted through brick and mortar dealer licensees. The vehicle offered for sale by the dealership must be present at the dealership’s licensed location at the time of the sales transaction or be available to the dealer directly from the manufacturer or distributor of the vehicle at the time of the advertisement or the offer of the vehicle for sale. The sale takes place at the licensed location and meets the requirements of VC §11714(b). Accordingly, the dealership is permitted to deliver the vehicle to the customer at an off-site location in order to complete the sale through the licensed location as required by VC §5901(d). The dealer and salesperson must comply with all sales related requirements of the VC before, during, and after the sale of the vehicle.


Compliance Requirements

- All products must be contracted for sale prior to the delivery of the vehicle.
- All terms of the transaction must be agreed upon prior to the delivery of the vehicle at an off-site location. Negotiations may not be conducted at the purchaser’s delivery location.
- All contracts must be signed by the dealership before delivery of the vehicle at the off-site location. The purchaser may sign the contract at the time of delivery.
- Any person engaged in the negotiation and sale of the vehicle must be a licensed salesperson.
- A copy of all notices to the consumer required by the VC and the *Civil Code* must be provided to the purchaser **before** the purchaser executes all sales related documents, such as the notice of the right to inspection, etc.

Occupational License Renewals

- ▶ DMV launched portal to allow vehicle salespersons to renew licenses online.
(<https://virtual.dmv.ca.gov/online/renewal/>)
- ▶ Occupational license renewals can be also be completed by mail.



CA.GOV STATE OF CALIFORNIA **DMV** DEPARTMENT OF MOTOR VEHICLES  Translate

VEHICLE SALESPERSON RENEWAL OR REINSTATEMENT

Start The Vehicle Salesperson Renewal Or Reinstatement Form

[Start](#)

Before you begin:

- ✓ In order to renew or reinstate a vehicle salesperson license, you will need to complete a validation process consisting of the salesperson license number, DL/ID number, and full name as represented on the salesperson license card, prior to receiving access to the online application.
- ✓ Have your salesperson license card available.
- ✓ **To renew a salesperson license online, the expiration date must be within six (6) months**
- ✓ **To reinstate a salesperson license online, the license must be expired for a period of less than three (3) years, with no prior detrimental history such as criminal convictions or previous departmental action within the past ten (10) years.**
- ✓ Required fields to be completed: name, date of birth, email address, and phone number.



Part 2 Paycheck Protection Program Loan Update

Government Benefits – CARES Act (PPP)

What are you allowed to use PPP loans for?

- Payroll costs (allowable; forgivable up to \$100K per employee)
- Interest on mortgage obligations (allowable and forgivable)
- Interest on other debt obligations (allowable, might not be forgivable)
- Rent (allowable and forgivable)
- Utilities (allowable and forgivable)

Application Deadline

- June 30, 2020

Paycheck Protection Program

- ▶ Initial appropriation of \$349 billion in federal funds for the loan program was snapped up in a matter of days.
- ▶ Additional allocation of \$310 billion for a second round, most of which was similarly claimed quickly.
- ▶ Some dealerships have had their loans for more than 8 weeks now.
- ▶ But the SBA is still issuing loans until June 30, 2020 (or until funds are depleted)
 - ▶ As of June 15, 2020, there were more than 4.5 Million PPP Loans made, totaling \$512.3 Billion, with an average loan size of \$112K
 - ▶ Over 537,000 California businesses received more than \$66 billion in PPP loans.

PPP – Loan Forgiveness Overview

- ▶ Forgiveness based on total *forgivable expenses* during the *covered period*.
- ▶ Forgiveness amount reduced by the following:
 - ▶ Ratio between payroll expenses / other forgivable expenses.
 - ▶ FTE count reduction.
 - ▶ Wage reduction of certain employees.

PPPFA Changes Overview

- ▶ June 5, 2020 — President Trump signed the Paycheck Protection Program Flexibility Act (PPPFA)
 - ▶ Passed House with 1 dissenter and by unanimous consent in the Senate
- ▶ Changed the PPP to make it easier to maximize loan forgiveness:
 - ▶ Allows higher percentage of loan forgiveness for covered non-Payroll Expenses
 - ▶ Expands “covered period” during which funds must be spent from 8 weeks to 24 weeks
 - ▶ Extends the “Safe Harbor” date for rehiring Full-Time Equivalent employees from June 30 to December 31
 - ▶ Expands exceptions to FTE reduction analysis
 - ▶ Expands repayment period for new loans
 - ▶ Confirms payroll tax deferral on forgivable wages

PPP Forgiveness Details

- ▶ Forgiveness Overview (PPPFA Changes in Red)
 - ▶ Add up your forgivable expenses during the “Covered Period”
 - ▶ Total forgivable expenses will be reduced by complex process including:
 1. **At least 60% of total forgivable expenses must be payroll costs.**
 2. Reduction of FTEs compared to pre-crisis baseline periods.
 3. Person-by-person wage reduction analysis (does not include employees earning more than \$100K).
 - ▶ Reductions based on prongs 2 and 3 can be reduced/eliminated if employees rehired prior to **December 31, 2020**.
 - ▶ Reductions also eliminated where written job return offer at previous rate of pay is rejected.

PPP Forgiveness Details

- ▶ Covered Period
 - ▶ Original statutory language only referred to the eight-week period beginning on the day the first proceeds are distributed.
 - ▶ **PPPFA substituted 24-week period for the initial 8-week period.**
 - ▶ Borrowers may still use the 8-week period, if they wish.
 - ▶ Forgiveness Application and Regulations offer some flexibility.
 - ▶ “Alternative Payroll Covered Period” running from the first day of the payroll period that begins after the date on which funds are first disbursed.
 - ▶ But that only applies to payroll costs, not non-payroll expenses.
 - ▶ And it only applies where the employers uses a “bi-weekly (or more frequent) payroll schedule”.
 - ▶ Semi-monthly payroll does not appear to qualify, absent further clarification.

PPP Forgiveness Details

- ▶ Payroll Costs Paid and Costs Incurred
 - ▶ Payroll costs paid and payroll costs incurred during the applicable Covered Period are eligible for forgiveness.
 - ▶ Payroll costs are considered paid at the time the funds are delivered or the ACH is initiated.
 - ▶ Payroll costs are considered incurred at the time the work is performed.
 - ▶ Payroll Costs subject to forgiveness can effectively cover payroll for more than just the eight-week period.
 - ▶ Payroll costs incurred before the Covered Period but not paid until the window opens are eligible for forgiveness.
 - ▶ Payroll costs incurred during the Covered Period but not paid until the first payroll scheduled after the end of the Covered Period are also subject to forgiveness.

PPP Forgiveness Details

► Non-Payroll Costs Paid and Costs Incurred

- Rules are similar: Costs Paid and Costs Incurred during the Covered Period are potentially forgivable.
- Payments made during the Covered Period for covered purposes (mortgage interest, rent, utilities) are eligible.
- Costs incurred during the Covered Period are also eligible if paid by the next scheduled payment date.
- Example: Utility bills paid by 10th of each month, with PPP Covered Period June 1 through July 26.
 - May utilities are covered, because they are paid on June 10, within the Covered Period.
 - June, paid July 10, is also covered.
 - July utilities are largely incurred during the Covered Period, so costs incurred between July 1 and July 26 are covered, even though they are not paid until August 10 (e.g., outside the Covered Period).

PPP Forgiveness Reduction Details

- ▶ Original regulations cap forgivable non-Payroll expenses at 25% of the total.
 - ▶ **This was modified by the PPPFA.**
 - ▶ **Up to 40% of forgiveness amount may be for non-Payroll expenses.**
- ▶ In addition, regulations clarify that pre-payment of mortgage interest or other potentially eligible payments are not eligible for forgiveness.
 - ▶ And no mortgage principal is ever eligible for forgiveness.

PPP Forgiveness Reduction: FTE Count

- ▶ Reduction in the number of Full-Time Equivalent Employees (FTE Employees) will reduce the amount of PPP loan forgiveness available to the borrower.
 - ▶ This is done by dividing the average number of FTE Employees during the Covered Period (or Alternative Payroll Covered Period) against the average number of FTE Employees on the payroll during the reference period.
- ▶ Reference period is at the election of each individual borrower:
 - ▶ From February 15, 2019, through June 30, 2019; or
 - ▶ From January 1, 2020, to February 29, 2020

PPP Forgiveness: FTE Count

- ▶ Computation of FTE Employees is based on a 40-hour week.
 - ▶ The average number of hours paid per week for each employee is divided by 40
 - ▶ Rounded to the nearest tenth
 - ▶ Ten employees each paid 38 hours per week would aggregate to 10 FTE Employees
 - ▶ But ten employees each paid 37 hours per week would each count as 0.9 FTE, for a total of only 9 FTE Employees
- ▶ This differs from the 30-hour standard used by under the Affordable Care Act.
 - ▶ Treasury Department regulations confirmed that a 30-hour week was considered but rejected because “40 hours or more of work each week better reflects what constitutes full-time employment for the vast majority of American workers.”
- ▶ **This was NOT affected by the PPPFA, as some may have hoped.**

PPP Forgiveness: FTE Count

- ▶ Alternative simplified approach
 - ▶ Rather than calculate FTE headcount numbers based on actual hours less than 40 per week, employers may assign 0.5 FTE to each employee working less than 40 hours.
 - ▶ Even if the employee worked a 39.5-hour week
 - ▶ For employers whose part-time employees generally work more than 20 hours per week, this will result in a lower aggregate FTE count than using actual hours.
- ▶ The same method must be used for calculating both the reference period and the applicable Covered Period.
- ▶ Employers should run the math both ways and adopt the most favorable alternative.

PPP Forgiveness: FTE Count

- ▶ Example: Hypothetical Dealership averaged 150 employees during the selected base period of January–February 2020, each of whom were paid for 40-hour weeks.
 - ▶ This results in an FTE tally of 150.
 - ▶ March 2020 left 50 at FT, 50 at 20 hours/week, and 50 laid off.
 - ▶ Covered Period saw 50 restored to full time, 20 back to 20-hour weeks, 15 back to 30-hour weeks, and 15 not returned.

	50 FTE from the 50 Unchanged Employees
	50 FTE from the 50 restored to full-time work
	10 FTE from the 20 Employees averaging 20-hour weeks
+	12 FTE from the 15 Employees averaging 30-hour weeks
<hr/>	
	122 FTE for the Covered Period

- ▶ $122 \div 150 = 81.33\%$, for reduction of 18.67%

PPP Forgiveness: FTE Count

- ▶ Original Exceptions to FTE Reductions from Regulations and Forgiveness Application and Instructions
 - ▶ Employees who refuse good-faith offers to return to work.
 - ▶ Employees who Voluntarily Resign or a Discharged for Cause.
 - ▶ Employees who request and receive reduced schedules.
- ▶ Employers should document offers to return at the same rate of pay, and document any rejections by employees.
- ▶ Employers must notify EDD within 30 days of any rejections of return offers.
 - ▶ We've recommended this before, but now it's part of the forgiveness Regulations.

PPP Forgiveness: FTE Count

- ▶ **PPPFA Expands the Exception**, allowing Exclusion of individuals where the employer can demonstrate:
 - ▶ Inability to rehire individuals who were employed prior to February 15, 2020; and
 - ▶ Inability to hire similarly qualified employees for unfilled positions.
- ▶ Employer may also limit proportional forgiveness reduction if it can “document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by [HHS], the [CDC], or [OSHA] . . . related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19”.
- ▶ What will it take to make this showing? Nobody knows yet!

PPP Forgiveness: FTE Count

► Example Revisited

- 10 of the 20 employees brought back to 20-hour weeks had requested reduction (e.g., homeschooling or childcare responsibilities), and 10 of the 15 not recalled rejected offers to return to full-time employment.

5 FTE Exceptions from the 10 Employees requesting fewer hours
10 FTE Exceptions from the 10 Employees rejecting recall
+ 122 FTE working from the Covered Period
<hr/>
137 FTE for the Covered Period, as Adjusted

- New reduction: 8.67%, based on $137 \text{ FTE} \div 150 \text{ FTE} = 91.33\%$

PPP Forgiveness: FTE Count

- ▶ FTE Reduction Safe Harbor
- ▶ If the employer has the same number of FTE on **December 31, 2020**, as it had on February 15, 2020, then no FTE reduction is assessed at all.
- ▶ But this is a binary evaluation: even a slightly reduced FTE count by the correction date eliminates the safe harbor.

PPP Forgiveness: Wage Reductions

- ▶ Reductions of more than 25% in salary or hourly wage rate between the measuring period and the Covered Period will reduce forgiveness eligibility.
- ▶ Must be measured person-by-person
- ▶ First: Determine whether pay was reduced by 25%
 - ▶ Calculate average rate of pay during Covered Period (or Alternative Payroll Covered Period)
 - ▶ Calculate average rate of pay during Measuring Period
 - ▶ Not the same as FTE measuring period
 - ▶ January – March 2020 is the wage measuring period (full quarter prior to Covered Period)
 - ▶ By using pay rates (and not total pay), this method avoids double reductions based on both FTE and wage reductions.
- ▶ If there is no reduction or a reduction less than or equal to 25 of the measuring period wages, then there is no reduction in the forgiveness amount.

PPP Forgiveness: Wage Reductions

- ▶ Second: Determine whether Safe Harbor is met
 - ▶ Three Numbers:
 - ▶ Average rate of pay on February 15, 2020
 - ▶ Average rate of pay between February 15, 2020, and April 26, 2020
 - ▶ Average rate of pay on **December 31, 2020**
 - ▶ If wages were not reduced between February 15 and April 26, the safe harbor is not available.
 - ▶ If wages were not reduced between the February and April dates, but they were raised to at least the February 15 level by **December 31, 2020**, the Safe Harbor is met and no reduction is applied to this individual.

PPP Forgiveness: Wage Reductions

- ▶ Third: Calculate the Forgiveness Deduction
 - ▶ Only if more than 25% reduction and no Safe Harbor
 - ▶ Calculate the maximum forgivable amount of wages by multiplying the measuring period average wage rate by 75%, then subtract the Covered Period average rate, leaving the forgiveness reduction rate.
 - ▶ This rate is then applied to the Covered Period
 - ▶ Hourly employees use the average number of hours worked per week during the measuring period.
 - ▶ Salaried employees use 1/52 of the annualized salary reduction amount for each week in the Covered Period (up to 24 weeks).
- ▶ This process is done individually, and the total amount of individual wage reductions is aggregated and entered into the reduction form.

PPP Forgiveness: the new 40/60 Ratio

- ▶ The statute does not include a limitation on forgiveness of non-payroll expenses
 - ▶ But the regulations included a cap on such forgiveness equal to no more than 25% of the total forgiveness amount.
- ▶ PPPFA statutory language codifies a modification of this rule.
 - ▶ Employers “may use up to 40 percent” of the forgiveness amount for non-payroll costs; but they
 - ▶ “Shall use at least 60 percent of the covered loan amount for payroll costs”.

PPP Forgiveness: the new 40/60 Ratio

- ▶ As written, this language would mandate that employers who do not use at least 60% of the loan for payroll costs receive no forgiveness at all, even on what they did spend on payroll costs.
 - ▶ This created a small firestorm, with some calling immediately for a “fix” to the “fix”.
 - ▶ Almost immediately, both the Treasury Secretary and SBA Administrator clarified that employers who use less than 60% of their loans for payroll could still get partial forgiveness, provided that at least 60% of the forgiven amount goes toward payroll costs.
- ▶ Combined with the wider period of time within which to spend the PPP money, this anticipated regulatory flexibility should mean that most employers should not have to worry about the potential “60% cliff” problem”.

PPP Forgiveness: Putting it all Together

- ▶ Four final steps:
 - ▶ First, total the amount of Payroll and Non-Payroll costs paid and incurred during the Covered Period.
 - ▶ Second, enter the aggregated individual reductions based on reduced compensation rates.
 - ▶ Third, apply the FTE reduction percentage.
 - ▶ Fourth, apply the now-60% threshold to exclude excessive non-payroll costs from the forgiveness total.
- ▶ Final Forgiveness Amount is the lesser of
 - ▶ The original amount of the PPP Loan; or
 - ▶ Total eligible payroll expenditures (after reducing for FTE or reduced wages) *divided by 60%*.

How to maximize your loan forgiveness?

- ▶ Determine whether you want to request forgiveness using the 24 week or original 8-week covered period.
- ▶ Make sure that at least 60% of loan proceeds are used for payroll costs during the Covered Period.
 - ▶ Reinstatement employees as you can, but with the broader period to spend the money, there is more room for commercial reality.
- ▶ Use an employee recall notice when rehiring employees. Include in the notice that the position is for the same salary/hours/wages as before.
 - ▶ Document any employee rejections of this offer. (Will allow you to reduce loan forgiveness reductions due to headcount.)
 - ▶ Remember – Have your rehired employees sign a reinstatement agreement.
- ▶ Document any difficulties you may have in replacing workers whom you are unable to bring back.

How to maximize your loan forgiveness?

- ▶ Prepare records to support expenses and your eventual forgiveness application.
- ▶ Use your records to model best forgiveness strategy (e.g., may be able to exclude employees if they earned more than \$100K on an annualized basis during any pay period in 2019).



Part 3 EMPLOYMENT LAW ISSUES AND ANSWERS

Required Compliance Checklist for Dealers

► Checklist Overview:

- Create a COVID-19 Compliance Team and name the Team Leader and assign duties
- Written Worksite Prevention and Response Plan
 - Much Like an Injury and Illness Prevention Program for COVID-19
 - Sample Provided Free of Charge by Fine, Boggs & Perkins LLP, CNCDA and HR Hotlink
- Required Employee Training
 - Manager (Supervisor)
 - Employee
 - Sample Provided Free of Charge by Fine, Boggs & Perkins LLP, CNCDA and HR Hotlink
- Daily Individual Symptom Screening
 - Sample Provided Free of Charge by Fine, Boggs & Perkins LLP, CNCDA and HR Hotlink
- Cleaning and Disinfecting
- Physical (Social) Distancing

Individual Screening and Responsibility

- ▶ Symptom screenings and/or temperature checks.
- ▶ Time must be treated as hours worked for compensation purposes for each day separately.
- ▶ Use a symptom check list—*available through HR Hotlink, Fine, Boggs & Perkins LLP and CNCDA*



Recognizing the Symptoms

- ▶ We MAY have exposure! Now what?
 - ▶ EEOC has relaxed certain employee privacy rules in light of the pandemic.
 - ▶ Employees must self-check if they have symptoms of COVID-19:
 - ▶ Dry cough
 - ▶ Fever
 - ▶ Shortness of breath or difficulty breathing
 - ▶ Muscle pain
 - ▶ Headache
 - ▶ Chills
 - ▶ Sore throat
 - ▶ New loss of taste or smell
 - ▶ Repeated shaking with chills

Symptoms Checks-It Is Not All Or Nothing

- ▶ The Symptom Checker is a tool to track the symptoms associated with COVID-19 as set forth by the Center for Disease Control and public health officials.
- ▶ The CDC has established that the symptoms listed in the Symptom Checker should be used as the standard for determining whether employees may have the COVID-19 virus.
- ▶ Having one of the symptoms on any given day triggers a fail for that day on the Symptom Checker. However, failing for that day does not necessarily mean that the employee must remain out of work for any extended period of time. A failure on the symptom check simply means that the employee should not enter the workplace until the employer makes a determination based on the symptoms experienced whether the employee should or should not come to work and whether or not self-quarantine or a test for COVID-19 must be done before returning to work—which may be the same day.

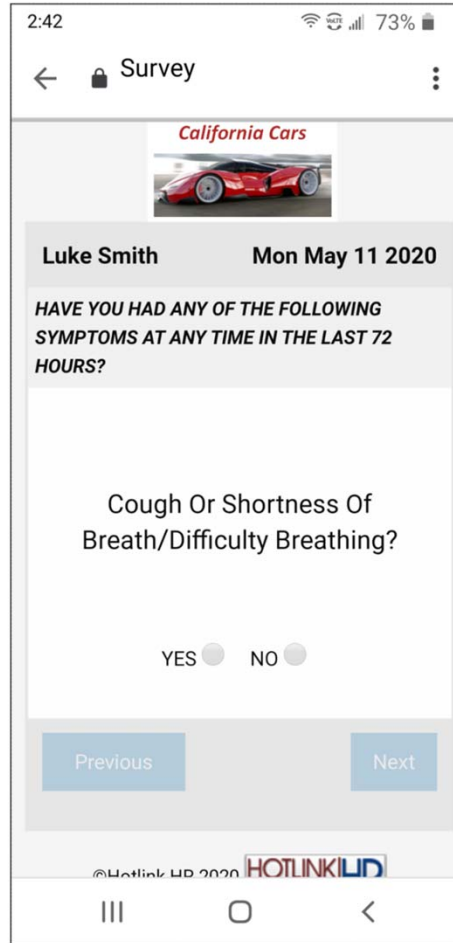
Symptoms Checks-It Is Not All Or Nothing

- ▶ In making this decision, the employer should use the rule of reason.
- ▶ This means that if, for example, the employee indicates he/she has body aches one day, and upon inquiry it is discovered that the employee frequently experiences body aches (even prior to the COVID-19 pandemic), then the decision may be to return the employee to work immediately.
- ▶ The same can be said for an employee who has trouble breathing one day and upon inquiry it is determined that the employee has chronic asthma and experiences this frequently.
- ▶ Again, applying a reasonable approach, the employer may determine that the employee's symptoms are not likely associated with COVID-19 and may instruct the employee to return to work. In these circumstances, it may also be prudent to instruct the employee to take extra precautions such as wearing a mask in the workplace, staying away from others and not sharing workspaces or equipment until it is determined whether other symptoms occur.
- ▶ If an employee reports more than one symptom, greater precautions should be taken to prevent the employee from returning to work, especially where the employee has had no history of such symptoms.
- ▶ The attorneys at Fine, Boggs & Perkins LLP are available to answer questions regarding COVID-19 workplace issues without charging for telephone advice.

Symptoms Checks

HR Hotlink Provides the automated solution now.

- Right from Employee's own iPhone or Android device
- Remember Reasonable Reimbursement Rules for Phones- Perhaps Offer Alternative



2:42 73%

Survey

California Cars

Luke Smith Mon May 11 2020

HAVE YOU HAD ANY OF THE FOLLOWING SYMPTOMS AT ANY TIME IN THE LAST 72 HOURS?

Cough Or Shortness Of Breath/Difficulty Breathing?

YES NO

Previous Next

@Hotlink HR 2020 HOTLINK

What do we do if an employee reports that they have COVID-19?

- ▶ What if an employee tests positive or has symptoms?
 - ▶ The infected employee should not return to work and must self-isolate.
 - ▶ Person should self-isolate for at least 10 days since the beginning of symptoms.
 - ▶ Must wait until 3 days after the fever abates and symptoms diminish without medication.

What do we do if an employee reports that they have COVID-19?

- ▶ Inform fellow employees who came in actual contact or close contact (within 6 ft. or in a closed space for more than 10 minutes) with the infected employee of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).
 - ▶ The fellow employees should follow exposure guidelines listed previously, including then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).
 - ▶ Disinfect and Clean workspaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.
- ▶ Report it to OSHA?
 - ▶ Confirmed Case of COVID-19.
 - ▶ Employee had to seek medical care or be absent from work.
 - ▶ COVID-19 was contracted by employee at work (work-related).

What do we do if we believe any employee may have been exposed to COVID-19– No Confirmation of Actual Infection?

- ▶ May we send home individuals who we believe may have been exposed to the virus?
 - ▶ If a person traveled to an area with a high infection rate, self-quarantine for 14 days.
 - ▶ Critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.
 - ▶ A potential exposure means being a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19.
 - ▶ The timeframe for having contact with an individual includes the period of time of 48 hours before the individual became symptomatic.
 - ▶ If you observe an individual with COVID-19 symptoms, send them home immediately and require that they meet the “Return to Work” Requirements.

What do we do if we believe any employee may have been exposed to COVID-19 but there has been no confirmation of actual infection and no symptoms?

- ▶ CDC Guidance: Critical Infrastructure workers who have had an exposure but remain asymptomatic should adhere to the following practices prior to and during their work shift:
 - ▶ Pre-Screen: Employers should measure the employee's temperature and assess symptoms prior to them starting work upon entering the facility.
 - ▶ Regular Monitoring: As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
 - ▶ Wear a Mask: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure.
 - ▶ Social Distance: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
 - ▶ Disinfect and Clean work spaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.
 - ▶ Do not share equipment or electronic devices.

What do we do if we believe an employee has COVID-19?

- ▶ May we send home individuals who we believe may have the virus? YES!
 - ▶ If symptoms are present:
 - ▶ If the employee becomes sick during the day, they should be sent home immediately.
 - ▶ Surfaces in their workspace should be cleaned and disinfected.
 - ▶ Information on persons who had contact with the ill employee during the time the employee had symptoms and 2 days prior to symptoms should be compiled.
 - ▶ Others at the facility with close contact within 6 feet of the employee during this time would be considered exposed.
 - ▶ Those persons should abide by guidelines for exposed individuals listed previously.

What do we do if we believe or are informed that an employee is particularly susceptible to COVID-19 complications?

- ▶ Employees with pre-existing conditions may be entitled to reasonable accommodations such as time off or additional distancing in the workplace.
- ▶ Handle like any other disability accommodation- interactive process.
- ▶ Handle discreetly to protect privacy.
- ▶ Don't force them unilaterally to go home and not work.
- ▶ Follow their health care provider's advice.

How Do We Get People to Return to Work?

- ▶ People are making on the average almost \$1000 per week to be home, free of risk from COVID-19, to do nothing and the job search requirement has been all but obliterated.
- ▶ People are afraid of coming back to work because they have their own health risks due to conditions that make them more susceptible to COVID-19: e.g., heart conditions, lung conditions, diabetes, age, mental issues (panic attacks, fear, depression) etc.
- ▶ People just don't want to be at risk or use it as an excuse to not return even though they have no risk factors based on their age or health.

How Do We Get People to Return to Work?

- ▶ People who turn down a new job — or their old one — because of coronavirus concerns may be able to continue collecting unemployment insurance, according to new guidelines from the California Employment Development Department.
- ▶ Normally people who turn down a job offer are denied unemployment benefits, unless the position is not “comparable suitable” employment.
- ▶ The EDD says a job could be deemed unsuitable if the workplace has not met state or county requirements for reopening.
- ▶ A job offer could be deemed unsuitable if the employee is older than 65, has a weakened immune system or has a chronic health condition that means COVID-19, the coronavirus disease, poses more of a threat.
- ▶ The job being offered on recall could also be deemed unsuitable if it pays significantly less than previously.

How Do We Get People to Return to Work?

- ▶ HOW DO WE GET THEM BACK?
- ▶ Put the recall in writing. Give a deadline to report for work.
- ▶ Inform them that they have the same or substantially similar job, pay and benefits.
 - ▶ Doing so may give you a cure to PPP “head count” failures.
- ▶ Inform them that they may lose their right to unemployment if they turn down the job.
 - ▶ The PPP provisions REQUIRE employers to inform the State Unemployment authorities within 30 days of any rejected offer to return to work.

How Do We Get People to Return to Work?

- ▶ Inform them that you are following all the rules regarding Reopening Protocol and Social Distancing and have a written plan in place.
- ▶ Inform them that they will no longer be considered eligible for recall if they turn down the job and unemployment only lasts until July 31, 2020 and at that time there will be a lot of people seeking any open positions.
- ▶ Instruct them that if they don't come back and wish to remain subject to recall they must put their reasons in writing to you and they need to let you know if any health care provider has indicated that they should not return or if they have any condition which prohibits them from returning.
 - ▶ This gives you the information you need to know if an "interactive discussion" is required to consider any "reasonable accommodation" for a medical condition.
- ▶ A sample recall letter is available also available at <https://www.employerlawyers.com/legal-updates/>.
- ▶ Send EDD Notification that employee refused reinstatement (sample notice available at Fine, Boggs & Perkins LLP, HR Hotlink and CNCDA.

Issues with reductions in employee hours

- ▶ Many businesses are considering reducing employee hours due to reductions in business activity
- ▶ Key factors to consider
 - ▶ Salaried exempt employees may need to be reclassified as hourly.
 - ▶ Minimum monthly earnings must be at least \$4506.67 so may want to change to hourly.
 - ▶ Unemployment benefits – in many cases, a reduction in hours triggers partial unemployment insurance benefits.
 - ▶ If an employee receives any UI benefits, they may qualify for the full \$600 supplemental weekly benefit (expires in late July).
 - ▶ PPP FTE / loan forgiveness reduction – reducing hours may result in a reduction in loan forgiveness.
 - ▶ May affect compensation to other forgivable expenses ration.
 - ▶ May affect FTE count because FTE is based on 40 hours per week.

I Can't Come to Work Because A Family Member May Catch COVID-19.

- ▶ EEOC updated their guidance on June 11, 2020.
- ▶ Is an employee entitled a reasonable accommodation (e.g., extended leave) to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition? No.
- ▶ The ADA does not require an employer to accommodate an employee without a disability due to the family member's disability. No California state law discussion of this at this point.
 - ▶ This is much different than a care-giver requests (e.g., FMLA/CFRA)
- ▶ An employee is not entitled under the ADA to telework as an accommodation to protect a family member with a disability. An employer, however, may choose to do so voluntarily.
- ▶ But don't pick and choose between employees.

I Am Being Harassed Because I Am Coughing or Because I am Asian.

- ▶ Managers should be alert to situations where employees are being harassed due to their medical condition or their ethnicity.
- ▶ Worksite harassment of employees may also originate with contractors, customers or clients.

I Refuse To Do A Symptom Check Or Let You Take My Temperature.

- ▶ EEOC says this is a request for reasonable accommodation.
- ▶ Hold an interactive discussion with employee.
- ▶ See what can be done to accommodate.
 - ▶ For example:
 - ▶ Let them know that results are not kept and are confidential.
 - ▶ Let them conduct the screening themselves
- ▶ Accommodate for disability (including pregnancy) and/or religious reasons.

Thank you!

Brian Maas, CNCDA President

bmaas@cncda.org

916-441-2599

Anthony Bento, CNCDA Director of Legal Affairs

abento@cncda.org

916-441-2599

John Boggs, Fine, Boggs, and Perkins LLP

jboggs@employerlawyers.com

650-712-8908

HR Hotlink

www.hrhotlink.com

(415) 760-6849 (information)