

COVID-19 and RTW: What You Need to Know Now

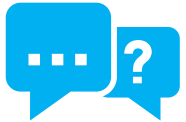
July 13, 2020 | 1:00 - 2:15 PM



Webinar Procedures



All lines will be muted



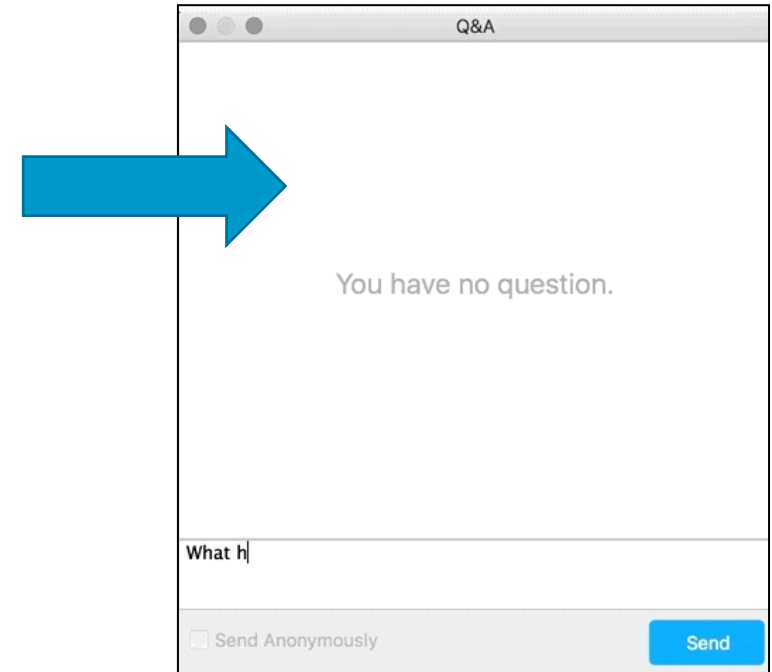
Please submit all questions using the “Q&A” dialog box



Email Diane Engel at dengel@nebgh.org with any issues during this webinar



The recording and a PDF of the slides will be shared





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COVID-19 Return to Workplace

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July 13, 2020

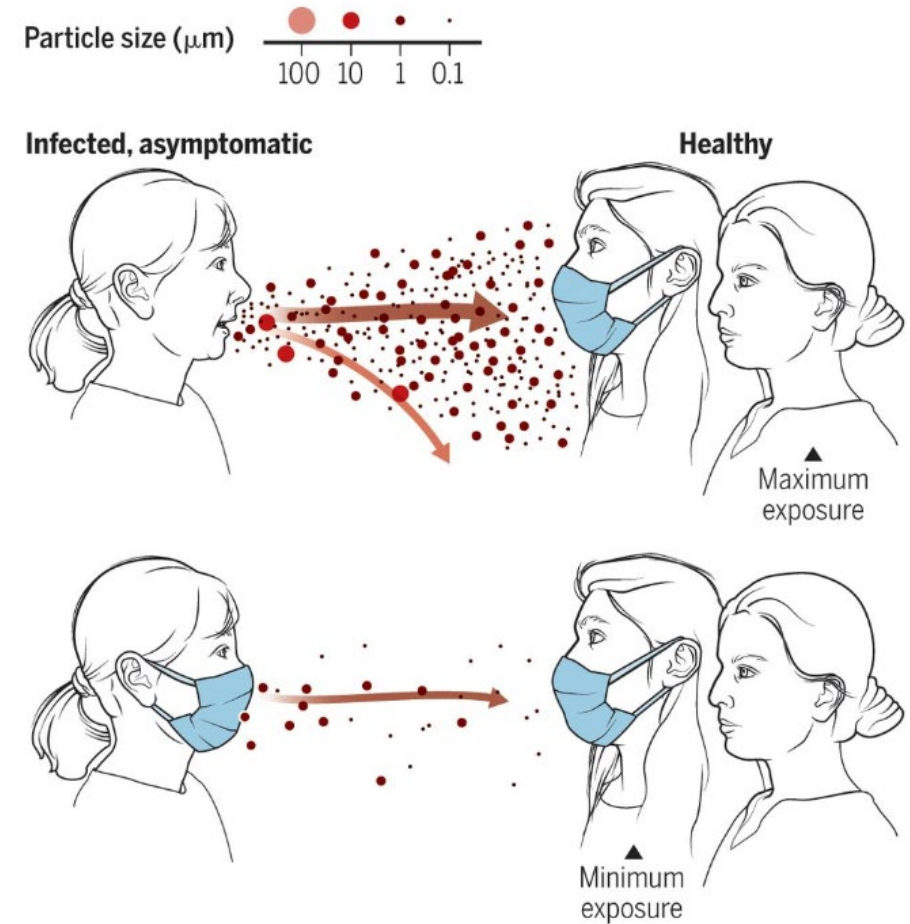


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COVID-19 Transmission: Respiratory Droplets

The SARS-CoV-2 virus is primarily transmitted via close person-to-person contact. The virus is carried in respiratory droplets released when an infectious individual coughs, sneezes, breathes, or talks.

- Spread through respiratory droplets emitted when an infectious individual coughs, sneezes, or talks
- Spread is more likely when people are within 6 feet
- Social distancing and masks shown to be effective interventions
 - Masks work by primarily by protecting others from droplets expelled by the wearer
 - Most effective when deployed together
- May be spread via surfaces but less common



COVID-19 Transmission: Aerosols

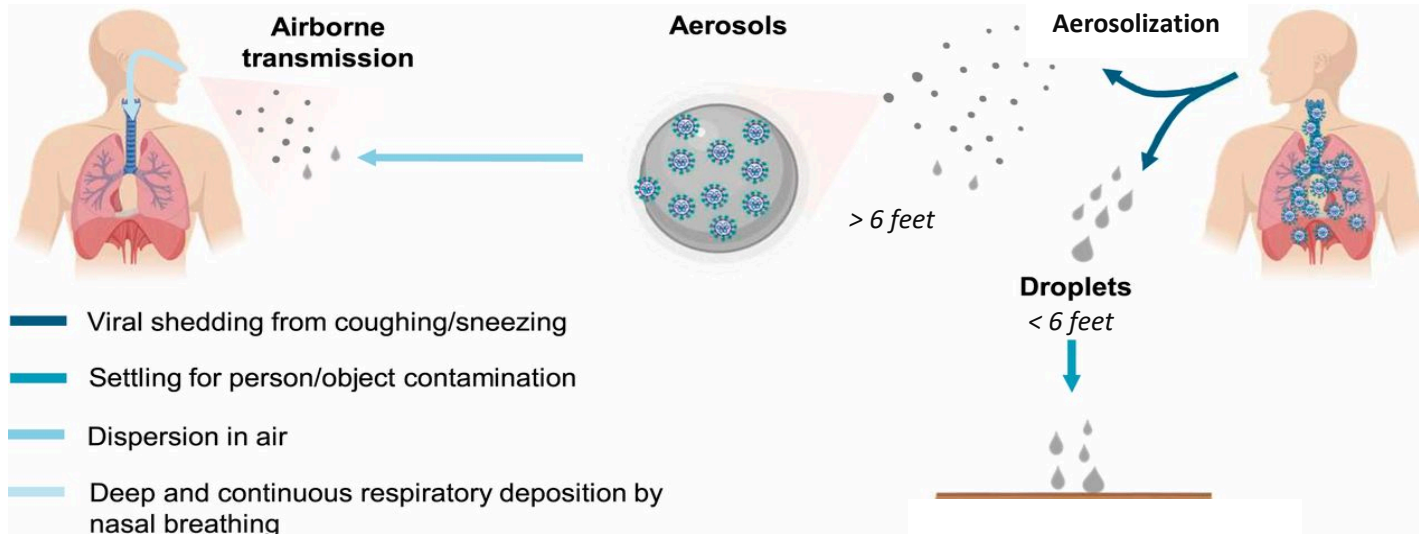
Given our understanding of how the disease spreads is incomplete, there has been recent scientific debate around the risk of aerosol or airborne transmission.

What are Aerosols?

- Compared to droplets, aerosols are respiratory particles that:
 - Are smaller in diameter
 - Travel longer distances
 - Remain in the air longer

Aerosol Transmission & Implications

- The WHO currently recognizes aerosol transmission as a result of aerosol generating procedures in healthcare settings
- It states aerosol transmission “cannot be ruled out” in indoor crowded spaces; scientists are advocating for a stronger stance
- Additional preventative measures to consider:
 - Ensure sufficient and effective ventilation
 - Avoid overcrowding



COVID-19 Transmission: Superspreaders

On average, 1 COVID-19 positive individual infects 2 – 3 others. However, in practice, a small number of positive employees can drive the majority of COVID-19 transmission:

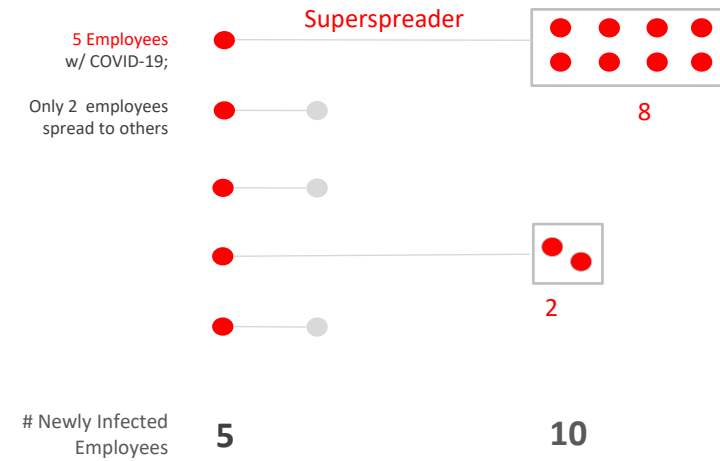
Average Transmission

- R_0 : On average, each infected employee infects 2-3 others



Superspreaders

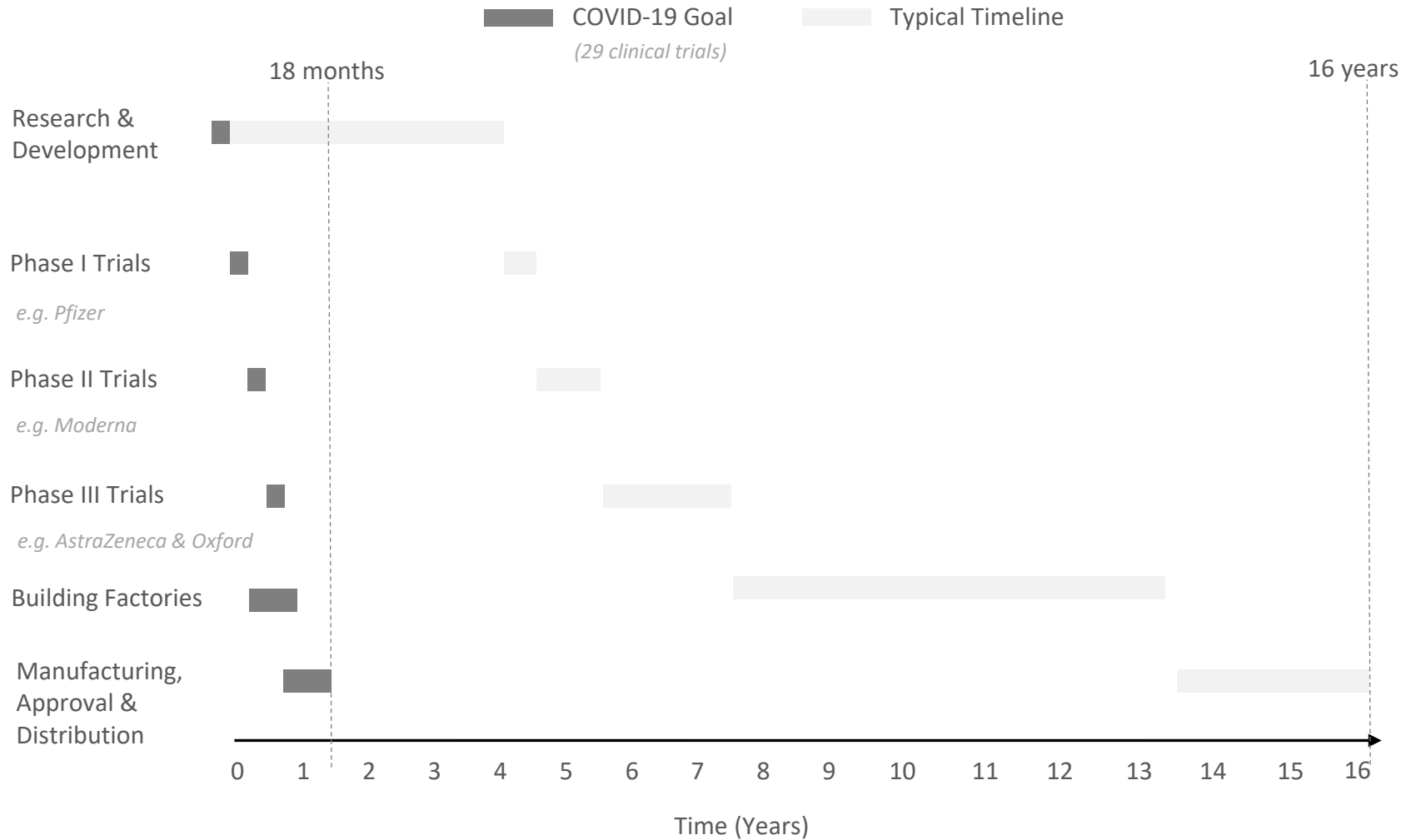
- **Superspreaders:** The average doesn't tell the entire story
 - 10% of cases lead to 80% of the spread¹
 - Some people do not infect any others
 - Driven by individual variability and environmental factors
- Focus workplace mitigation strategies on superspreaders



1. Endo, Akira. "Estimating the overdispersion in COVID-19 transmission using outbreak sizes outside China, Wellcome Open Res, 2020; 5:67
1. Lloyd-Smith et al. Superspreading and the effect of individual variation on disease emergence. Nature 2005

COVID-19 Vaccines: Estimated Timeline

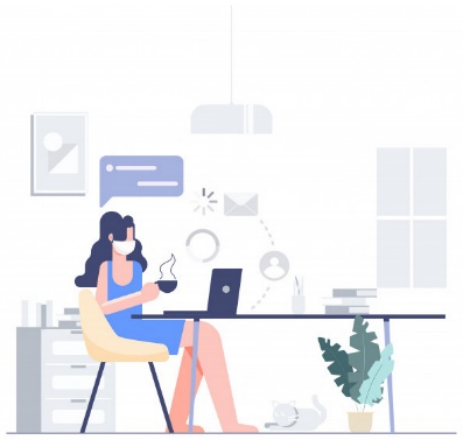
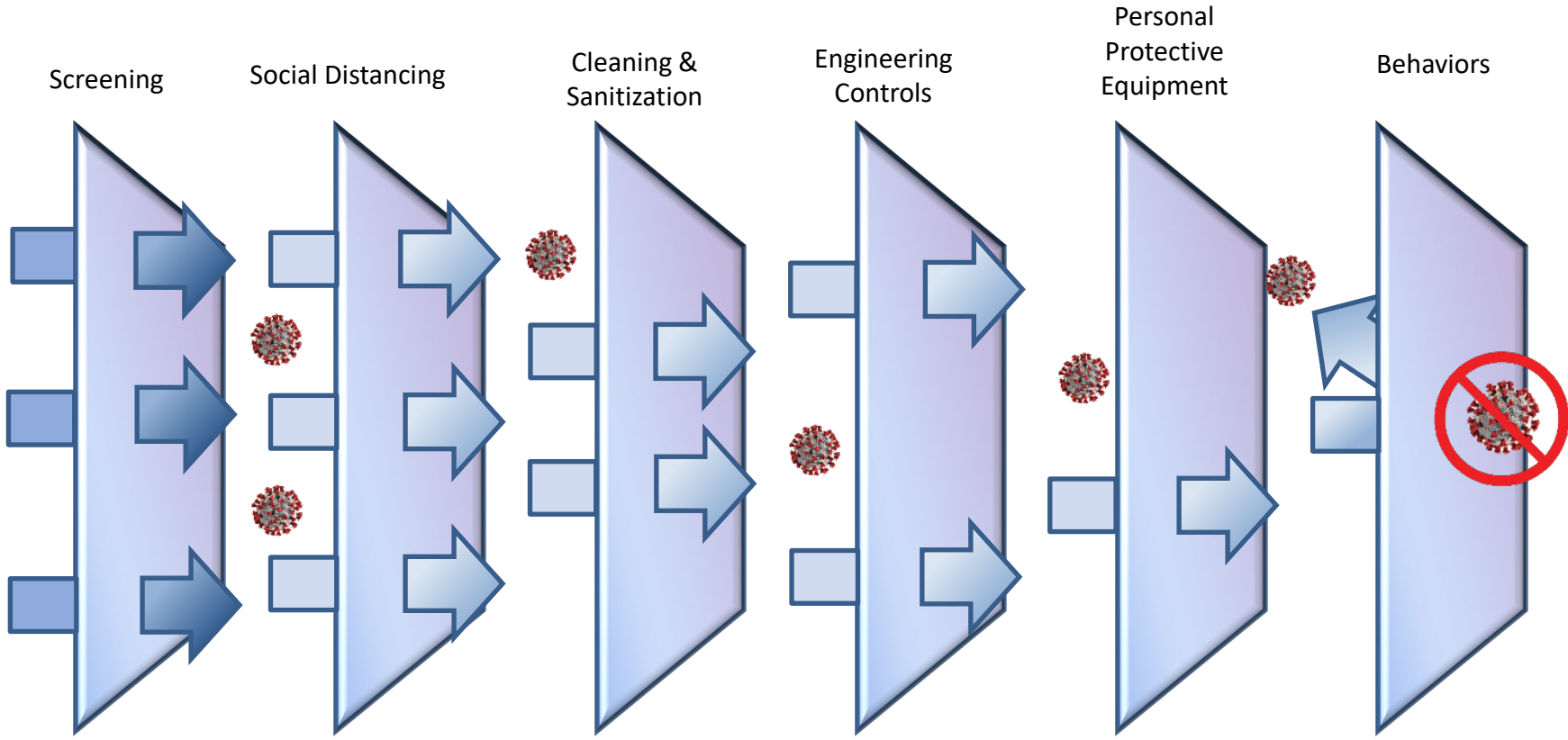
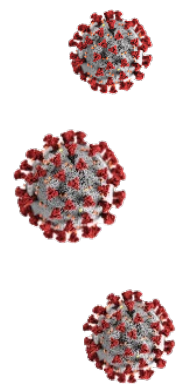
Experts estimate a vaccine could become widely available to the general public in 2021. However, the vaccine development process has typically taken a decade or longer.



RTW Risk Mitigation



Layers of Control



Symptom Screening
Temperature Screening
Testing

6 feet Workstations
One-way
↓ Employee #'s
Shifts
Shared Spaces
WFH

Cleaning
Deep Cleaning
UVC

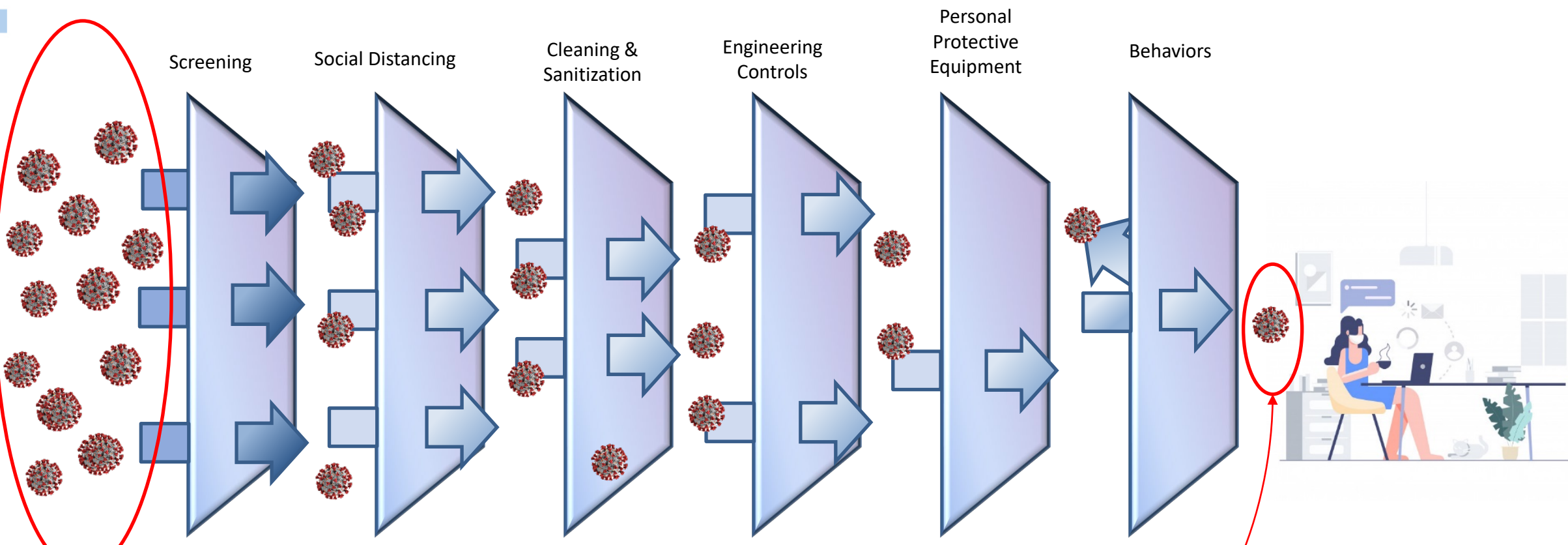
Ventilation
Filtration
Barriers

Masks
Face Shields
Gloves

Personal hygiene
Personal Behaviors



Layers of Control



What is happening in the community may overwhelm any workplace controls



Administrative Controls

- Minimizing employee density
 - Work from home
 - Shifts
 - Essential workers
- Minimizing Impact of a case in the workplace
 - Contact tracing
 - Pods
 - Protecting high-risk populations
- Minimizing the Likelihood of a case in the workplace
 - Leadership
 - Communication and education
 - Consistency

Transmission vs. Control

	Surface	Droplet	Aerosol
Restricted Numbers	+++	+++	+++
Masks		++++	+
Physical Distancing	+	++++	++
Behaviors	+++	++++	++
Ventilation ¹		+	+++
Cleaning	++		UVC
Face shields		+++	+
Barriers	-	++	+
Screening ²	+	+	
Testing PCR/Antigen	++	++	++
Testing Antibody	-	-	-
Gloves	+/-		

1 Fresh air dilution, flow rate, filtration >MERV13

2 Symptom, temperature

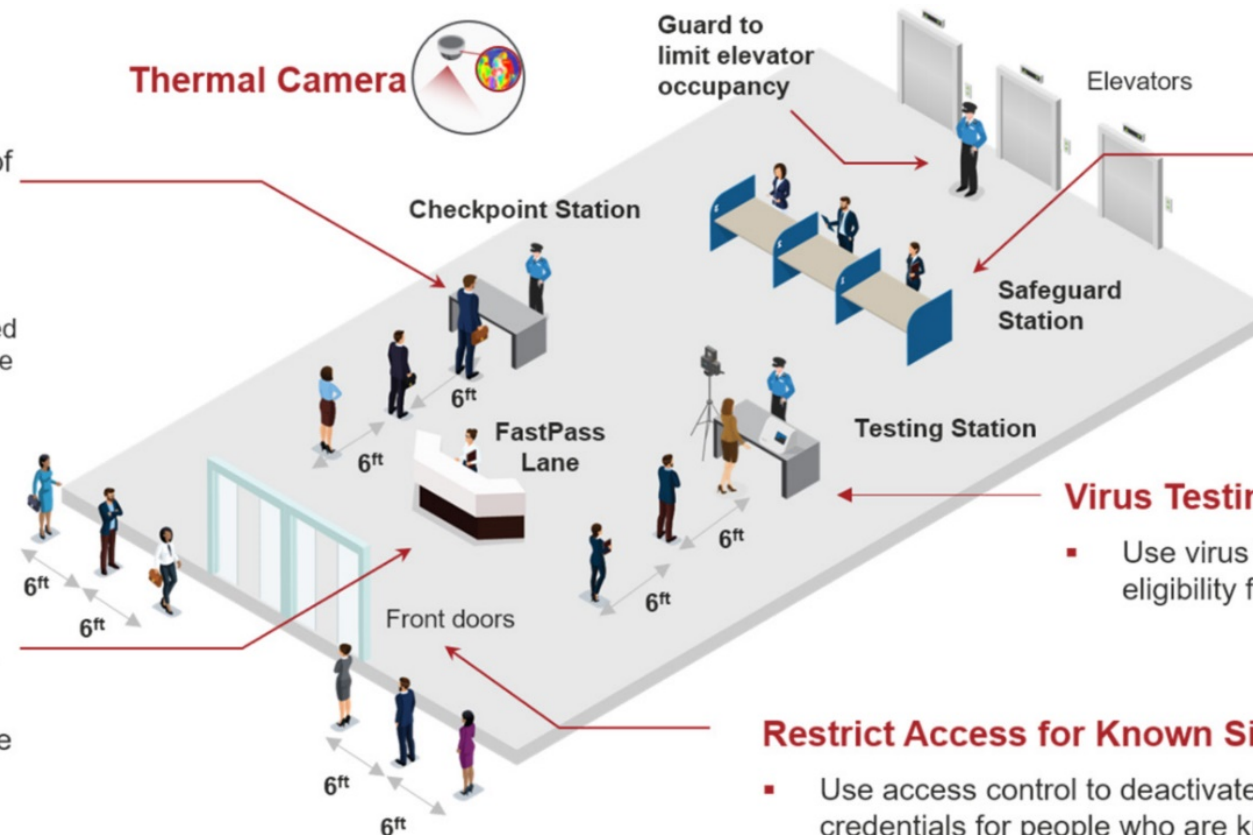
Is this the future?

Checkpoint Setup (Today)

- Screening could include any or all of the following:
 - > Temperature check to detect body temperature
 - > Screening questions
 - > Check to ensure access not restricted
 - > Badge printer to show screening date and expiration

FastPass Lane

- Occupants who have completed the screening questions via the mobile app within the last hour or who have tested for antibodies* can proceed to the FastPass Lane for temperature check



Safeguard Station Components:

- Disinfect hands
- Disinfect shoes
- Provide masks & gloves
- Encourage social distancing

Virus Testing Station (Future)

- Use virus testing to determine access eligibility for each entry

Restrict Access for Known Sick

- Use access control to deactivate credentials for people who are known to be sick

Image courtesy of Kastle Systems

More Likely



Delay return to office into 2021



Increased amount of working from home as the new norm



New thinking to office design



Rethink meetings and business travel



Leveraging technology



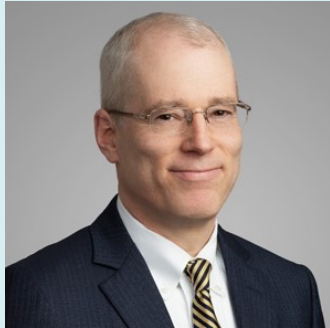
Testing maybe a game changer



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Northeast Business Group on Health (NEBGH)

COVID-19 and Return to Work: What You Need to Know Now

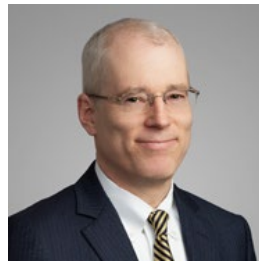
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July 13, 2020

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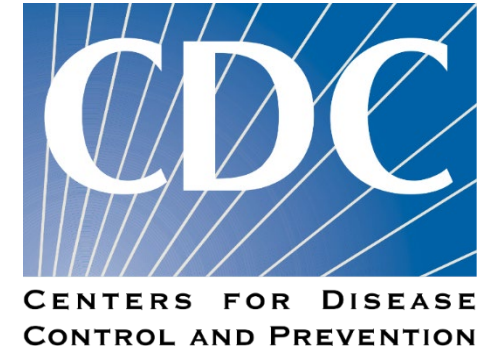


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Navigating the Patchwork of Federal, State, and Local Workplace Safety Guidance

Sources of Guidance: Federal



- Occupational Safety & Health Administration (OSHA)
- Centers for Disease Control and Prevention (CDC)
- President/White House e.g., Executive Orders, Declaration of Emergency



Sources of Guidance: State, County, City, etc.

- State and Local Sources
 - Executive Orders
 - State or local agencies, e.g., DOH
- Requirements + Best Practices
- The states and localities have taken the lead on imposing pandemic-related mandates



Sources of Guidance: State, County, City, etc. - Continued

Requirements + Best Practices

- Some “guidance” is mandatory
- Some is merely recommended

Example:





Reopening New York

**Office-Based Work Guidelines for
Employers and Employees**



These guidelines apply to all business activities where the core function takes place within an office setting that have been permitted to [reopen](#) as well as to office-based businesses statewide that were previously permitted to operate as essential. This guidance may apply – but is not limited – to businesses and entities in the following sectors: Professional services, nonprofit, technology, administrative support, and higher education administration (excluding full campus reopening). Please note that these guidelines may also apply to business operating parts of their business functions under different guidelines (e.g. front office for a construction company). See Interim COVID-19 Guidance for Office-Based Work for full details.

During the COVID-19 public health emergency, all operators of office workspaces should stay up to date with any changes to state and federal requirements related to office workspaces and incorporate those changes into their operations. This guidance is not intended to replace any existing applicable local, state, and federal laws, regulations, and standards.

	Mandatory	Recommended Best Practices
Physical Distancing	<ul style="list-style-type: none"> ✓ In Phase II, limit the total number of occupants at any given time to no more than 50% of the maximum occupancy for a particular area as set by the certificate of occupancy. ✓ A distance of at least 6 ft. must be maintained amongst all individuals at all times, unless safety of the core activity requires a shorter distance. ✓ Any time workers or visitors must come within 6 ft. of another person, acceptable face coverings must be worn (ensuring that mouth and nose are covered). Individuals must be prepared to don a face covering if another person unexpectedly comes within 6 ft. ✓ Prohibit the use of tightly small spaces (e.g. elevators, vehicles) by more than one individual at time, unless all individuals are wearing face coverings. If occupied by more than one person, keep occupancy under 50% of maximum capacity. ✓ Shared workstations (e.g. “hot-desks”) must be cleaned and disinfected between users. 	<ul style="list-style-type: none"> ✓ Modify or reconfigure the number of workstations and employee seating areas and desks for their workers, so that workers are at least 6 ft. apart in all directions (e.g. side-to-side and when facing one another) and are not sharing workstations without cleaning and disinfection between use. ✓ Implement strict clean-desk policies, so that non-essential items are stored in enclosed cabinets or drawers, rather than on desks. ✓ Limit use of shared workstations (e.g. “hot-desks”), when feasible. ✓ Leverage technology, such as room sensors and real-time dashboards, to quantify and display utilization of spaces throughout the office. ✓ Mark 6 ft. distance circles around workstations and other common stationary work areas. ✓ Reduce bi-directional foot traffic by posting signs with arrows in narrow aisles, hallways, or spaces.

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Return-to-Work Requirements

Northeast States: Employer COVID-19 Mandates

STATE (& CERTIFICATION)	PLAN / POLICIES	SCREENING	FACE COVERING	TRAINING	LOG
Connecticut (Self-certification)	Yes	Yes (100.4)	Yes	Yes (Details of state's reopening guidelines and cleaning requirements)	Yes
Maine (Checklist compliance form)	Yes	Yes (Temperature check not specified)	Yes (Certain employees)	Follow CDC guidance	Yes
Massachusetts (Self-certification)	Yes	Yes (100.0)	Yes	Yes (Social distancing, hand-washing, face coverings, self-screening, etc.)	Yes
New Hampshire	Yes	Yes (100.0)	Yes (Certain employees)	No	No
New Jersey	CDC/OSHA guidance	Yes (Certain businesses)	Yes	No	No
New York (Affirmation)	Yes (And site monitor)	Yes (100.0)	Yes	Yes (All new protocols)	Yes
Rhode Island (Maintain completed template)	Yes	Yes (follow CDC- 100.4)	Yes	Yes (Face coverings and hand washing)	No
Vermont	Yes, need plan if >10 employees (And health officer)	Yes (Temperature check encouraged)	Yes	Yes (Document employee attendance)	No

Safety Plans: New York Forward ‘Ground Rules’

Guidelines for Office-Based Work

- **Mandated!**
- Written (may use [NYS DOH template](#))
- Applies to essential and non-essential businesses
- Read and [affirm](#) detailed guidelines
- No waivers, e.g., unable to obtain PPE (Empire State Development FAQs)
- Must comply with the minimum state standards, federal laws and agency guidance
- Designate a **SITE SAFETY MONITOR** for “continuous compliance with all aspects of the site safety plan”
- **Must train** “ALL PERSONNEL” on new protocols and frequently communicate safety guidelines



The New York Forward Safety Plan

Physical Distancing

- Limit occupancy, gatherings
- “Six feet of separation” rule, unless safety of “core activity” requires a shorter distance
- Workers and visitors **MUST** wear face coverings in common areas, e.g., elevators, lobbies, and when traveling around the office

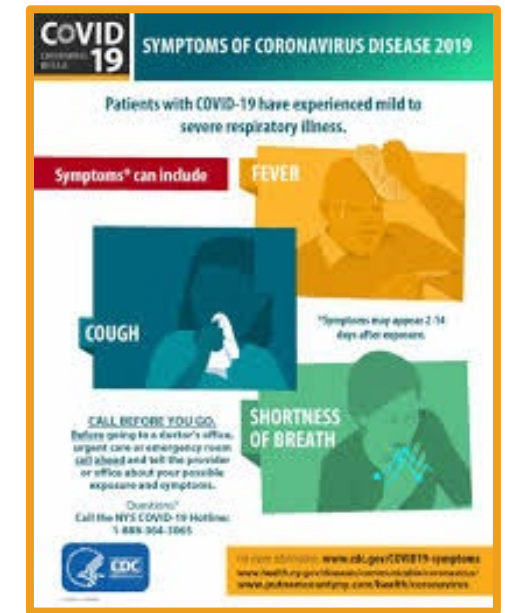


Hygiene/Cleaning Measures

- Provide PPE
- **Train employees** on donning, doffing, and caring for their PPE
- Provide handwashing stations and hand sanitizers
- Conduct regular (e.g., daily) facility cleaning/disinfection; follow CDC/OSHA guidance
- **Maintain a cleaning log**

Daily Screening Process

- Questionnaire, temperature check
- May be performed remotely prior to coming to office
- May employer maintain records?



The New York Forward Safety Plan

Protocols for Infected/Exposed Employees

To “Extent Possible,” Maintain a Continuous Log of Every Person Who May Have Had “Close Contact with Other Individuals at the Work Site”

- Maintain confidentiality per federal/state law
- Notify local health department of employees’ positive COVID-19 test results
- Also notify building management/provide log info
- Local health department will implement monitoring and movement restrictions of infected or exposed persons, including home isolation or quarantine

Implement Communication Practices

- Post signage throughout office detailing safety plan and employees’ obligation to adhere to its mandates
 - Use DOH COVID-19 posters or create own
- Signage should remind individuals of:
 - Personal hygiene protocols
 - Cleaning and disinfection practices
 - Social distancing rules
 - Obligation to report symptoms of or exposure to COVID-19, and how they should do so
 - Proper use and disposal of PPE



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Guidance on Employer Liability

Potential Employment Law Claims by Employees

- Discrimination
- Failure to accommodate
- Retaliation
- Failure to provide required paid or unpaid leave



Potential Tort Claims by Employees

- The potential claim: employer negligence or misconduct led to employee contracting COVID-19
- Workers' compensation = "exclusive remedy" for injuries arising "out of" or "in the course of" employment
- BUT, if employer engaged in willful or intentional misconduct, the workers' compensation "exclusive remedy" provision does not apply
- The million (billion???) dollar question: What does that mean in the COVID-19 era?



Other Potential Claims by Employees

- Public nuisance (potential injunctive relief)
- OSHA “general duty” clause (potential fines or penalties)
- State regulatory fines and penalties for violating reopening “guidance”



Potential Liability to Employee Family Members

- Workers' compensation "exclusive bar" not applicable to third parties (i.e., non-employees)
- Thus, workers' compensation will not bar family member lawsuits
- Most likely claim: employer negligence led to family member contracting COVID-19
- However, to succeed on such a claim, family member would need to show:
 - Employer owes duty to third-party;
 - Employer breached that duty;
 - Breach of duty caused injury (i.e., COVID-19); and
 - Third party suffered injury/damages.

Potential Liability to Customers, Vendors or Visitors Contracting COVID-19

- Again, workers' compensation "exclusive bar" not applicable to third parties (i.e., non-employees)
- Potential negligence claims
 - But, unlike an employee's household members, employers do owe a higher duty of care to "invitees"
 - Thus, the first element of a negligence claim—a "duty" owed to the person—is easier to satisfy for customer/vendor/visitor cases

How to Minimize Potential Liability for COVID-19?

- Adhere to federal, state and local reopening guidelines
- Continue work-from-home or delay reopening
- Utilize employee safety protocols with all workplace visitors (e.g., temperature and symptom screening, require face covering, enforce social distancing measures, etc.)
- Be flexible with employee accommodation requests
- Consult employment counsel regarding leave, paid time off, accommodation, and termination/furlough issues

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CARES Act Updates

Background

- CARES Act enacted on March 27th
- Included a host of provisions/relief related to retirement plans, health plans and other employee benefits
- Sponsors moved quickly to implement the CARES Act changes despite uncertainty
- Notices and more notices! Plethora of implementing guidance has since been issued

New Coronavirus Distributions & Expanded Plan Loans – Background

- Section 2202(a) of the CARES Act created a new coronavirus-related distribution option (up to \$100,000 in aggregate) to “qualified individuals” on or after January 1, 2020 and before December 31, 2020
- Section 2202(b) of the CARES Act allows a plan to increase the maximum plan loan to the lesser of \$100,000 or 100% of the “qualified individual’s” vested account balance
 - Also, any plan loan repayment of a qualified individual due on any outstanding loan between March 27, 2020 and December 31, 2020 may be delayed up to one year

New Coronavirus Distributions & Expanded Plan Loans – IRS Notice 2020-50

- IRS issued much-needed definitive guidance in [IRS Notice 2020-50](#)
- Confirms provisions are optional and mutually exclusive—employers may elect to implement the provisions in full, in part, or not all
- Significantly expanded definition of “qualified individual” (QI)
 - Added more adverse financial consequences from COVID-19 because QI had:
 - A reduction in pay (or self-employment income)
 - A job offer rescinded or employment date delayed

New Coronavirus Distributions & Expanded Plan Loans – IRS Notice 2020-50 - Continued

More people impact QI

- QI suffered adverse financial consequences as a result of COVID-19 because their **spouse or household member** (broadly defined as any person who shares the individual's principal residence) has:
 - 1) Been quarantined, furloughed, or laid off;
 - 2) Had their work hours reduced;
 - 3) Not been able to work due to lack of child care;
 - 4) Experienced a reduction in pay (or self-employment income); or
 - 5) Had a job offer rescinded or employment start date delayed, or
- QI has experienced financial adversity due to the closure (or reduction of hours) of a business that is owned or operated by the individual's **spouse or household member**.

New Coronavirus Distributions & Expanded Plan Loans – IRS Notice 2020-50 - Continued

- Plan Administrator may rely on QI certification (unless “actual knowledge to the contrary”)—sample certification is included in Notice 2020-50
 - However, QI is entitled to favorable tax treatment only if certification is true
- Notice addresses:
 - COVID distributions
 - What they are
 - Significance for plan
 - Significance for recipient
 - Recontribution; how to handle taxes
 - Clarifications on reporting
 - Increased loan limit

New Coronavirus Distributions & Expanded Plan Loans – IRS Notice 2020-50 - Continued

- Notice also addresses:
 - Loan payment suspension
 - Includes a “safe harbor” for suspending and extending plan loan repayments due through the end of 2020; other reasonable methods may be used
- Bonus guidance for nonqualified deferred compensation plans!
 - Can’t accelerate deferrals under 409A
 - Stopping deferrals midyear treated as acceleration unless unforeseeable emergency or hardship distribution
 - COVID distribution will be treated as hardship distributions for this purpose
 - Permits midyear cancellation of employees’ deferral

New Coronavirus Distributions & Expanded Plan Loans – IRS Notice 2020-50 - Continued



Takeaways

- Consider, adopt, and **DOCUMENT** desired changes
- Work with third party administrators (TPAs) and tax-reporting vendors on operational implementation and reporting
- Communicate changes to plan participants
- Work with pre-approved plan vendors/TPAs and legal counsel to timely adopt formal amendments
 - Deadline: no later than last day of the plan year beginning on or after January 1, 2022 (i.e., December 31, 2022 for calendar year plans); governmental plans have an additional two years

Waiver of 2020 Required Minimum Distributions (RMDs) in Defined Contribution Plans

- Section 2203 of the CARES Act temporarily waives the requirements for “required minimum distributions” from defined contribution plans (e.g., 401(k), 403(b) and IRAs, but not defined benefit pension plans)
- As of 2020, the age for withdrawing from retirement accounts changed to April 1 following the year the participant reaches age 72 (previously 70 ½)
- IRS [Notice 2020-51](#) provides much-needed guidance
 - Gives plan sponsors two options for implementing the waiver (both have participant choice):
 - Continue making RMD payments as a default action and let participants elect not to receive their RMD; or
 - Suspend RMD payments as a default action but let participants elect to receive their RMD.

Waiver of 2020 Required Minimum Distributions (RMDs) in Defined Contribution Plans - Continued

- If no participant choice, could have anti-cutback violation
- Gives sponsors options for applying the direct rollover rules to waived RMDs
- Allows participants and spouses to make indirect (60-day) rollovers of RMDs received this year and extends until August 31, 2020 the deadline to do so
- Includes model plan amendments
- Provides transition relief for SECURE Act for plans that made payments in early 2020 for those turning 70 ½ this year

Waiver of 2020 Required Minimum Distributions (RMDs) in Defined Contribution Plans - Continued



Takeaways

- Identify impacted participants and beneficiaries
- Work with legal counsel and plan TPAs to develop a compliance strategy and **DOCUMENT** decisions now
- Consider special participant communications targeted to specific groups
- Make necessary adjustments to income tax withholding systems
- Work with pre-approved plan vendors/TPAs and legal counsel to timely adopt formal amendments
 - Deadline: no later than last day of the plan year beginning on or after January 1, 2022 (i.e., December 31, 2022 for calendar year plans); governmental plans have an additional two years

Coverage for COVID-19 Testing

- Section 6001 of the FFRCA, as amended by Section 3201 of the CARES Act, requires group health plans and insurers to provide benefits for certain items and service related to COVID-19 diagnostic testing during emergency period
 - No cost-sharing, prior authorization or other medical management requirements permitted
- Section 3202(a) of the CARES Act requires plans and insurers to reimburse any provider of COVID-19 diagnostic testing an amount that equals to the negotiated rate
 - If no negotiated rate, reimbursement must be the cash price as listed on provider's public website
- DOL FAQ [Part 42](#) clarified a number of questions
 - Scope of plans subject to guidance; effective date/expiration date; scope of coverage requirements; notice requirements; coverage under an "excepted benefit" (e.g., EAP) or on-site clinic
- DOL FAQ [Part 43](#) further clarifies the requirements
 - Tests developed under a requested Emergency Use Authorization; at home tests; testing for surveillance or employment purposes not required; multiple tests; facility fees/balance billing/payment to OON providers; telehealth coverage

Employee Benefits Deadlines Extended

- Section 3607 of CARES Act amended Section 518 of ERISA to postpone certain filing deadlines for a period of up to one year in the case of a public health emergency
- [Joint Notice](#) and [EBSA Disaster Relief Notice 2020-01](#) issued pursuant to amended Section 518
 - Mandatory to disregard the “Outbreak Period” for:
 - Various mandatory notices and disclosures (e.g., SBCs, SPDs/SMMs, SARs, Qualified Default Investment Alternative (QDIA) notices, fee disclosures, mapping notices, etc.)
 - HIPAA’s special enrollment periods
 - COBRA notices/elections/payments
 - Benefit claims/appeal/external review deadlines
- “Outbreak Period” is the period of the national emergency through 60 days after the end of the national emergency period
 - Currently set to expire on July 25, 2020; HHS Secretary Azar has signaled intent to extend for 90 days

Employee Benefits Deadlines Extended - Continued



Takeaways

- Work with service providers to ensure that notices and requirements delays are properly implemented
- Monitor for additional extension

BUT WAIT...THERE'S MORE

- IRS [Notice 2020-52](#) (issued on June 29) clarifies requirements that apply to a mid-year amendment to a safe harbor section 401(k) plan and provides temporary relief from certain requirements that would otherwise apply to a mid-year safe harbor amendment adopted between March 13, 2020 and August 31, 2020 that reduces or suspends safe harbor contributions
- IRS [Notice 2020-42](#) (issued on June 3) provides temporary relief allowing plan elections, spousal consents to be signed remotely
- DOL released a [final rule](#) (on May 21) that allows employers to communicate retirement plan information online or by email
- IRS Notices [2020-29](#) and [2020-33](#) (issued on May 12) address expanded changes to section 125 plans for health and dependent care expenses due to the pandemic

TO BE CONTINUED...

- New COVID-19 legislative package targeted to pass before August recess
- Proposed [HEROES Act](#) (1854 pages!) has a number of employee benefit provisions
 - Speaker Pelosi's bill summary can be found [here](#)
 - Some highlights:
 - Coverage of COVID-19 *treatment* at no cost sharing
 - **COBRA subsidies**
 - Increase in carryover for health FSAs, addition of carryover for DCAPs, extension of grace periods
 - Pension funding relief
 - Expansion of waiver of RMDs to 2019 RMDs

Epstein Becker Green Coronavirus Resource Center

Epstein Becker Green Coronavirus News and Updates

Employers throughout all industries, and particularly those within health care, are now grappling with how to deal with the various implications of the coronavirus (COVID-19) on their businesses and workforce.

Please see below for our latest news, [subscribe for email notifications](#), and revisit for updates.



OVERVIEW	ALL TOPICS	BENEFITS	CORPORATE/BUSINESS/RETAIL	DATA/PRIVACY/HIPAA	
EMPLOYMENT AND LABOR	FDA	FFCRA/CARES ACT	GLOBAL WORKFORCE MANAGEMENT	GOVERNMENT RESOURCES	
HEALTH CARE	IMMIGRATION	OSHA	RETURN TO WORK	WAGE AND HOUR	VIDEOS & PODCASTS
EBG EVENTS					

<https://www.ebglaw.com/coronavirus-resource-center/>



Have a question? Use the Q&A box!

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Upcoming NEBGH webinars:

- **July 14:** High-Value Maternity Care in NY & NJ
- **July 20:** NEBGH Medical Director's Weekly Monday COVID-19 Update
- **July 23:** COVID-19 and Substance Use