



COVID-19 LEGAL FAQ

New York State Optometric Association

Abstract

This document is a running log of COVID-19 related questions submitted by NYSOA members to the NYSOA's legal counsel, and their respective answers. Please note that the answers to the questions contained herein is very general advice and guidance and, technically, the Association's legal counsel does not represent member optometrists individually. This document is not intended to replace the expertise of a competent attorney, accountant, or insurance agent. Please be aware of the limitations of the answers and guidance within this document and consider seeking individual counsel where appropriate.

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Unemployment Benefits

Q: Would you know, or can you find out, if practice owners in New York are eligible to collect unemployment insurance?

A (03/25/20): Eligibility for UI will depend on how he is employed. So, if he is an employee of a PC and has been paying into UI, it would appear he would be eligible. However, if he is considered a partner/owner and not an employee, UI benefits may be denied. It sounds like he may be in the former position and he certainly could apply.

FFCRA Paid Sick Time

Q (Pt 1): I'd like to hear from the NYSOA regarding the federal Families First Coronavirus Response Act, specifically the Paid Sick Time Requirement.

Given Gov Cuomo's PAUSE edit, does the closing of my office serve as a qualifying event under Sec 5102, (a) 1 "the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19"?

If my staff is still employed on April 2nd, am I required to pay 2 weeks federally mandated paid sick leave, and more importantly will I qualify for reimbursement?

I want to do the right thing by my staff, but I want to be sure that they're eligible for payment and I'm eligible for reimbursement under these circumstances.

A (Pt 1) (03/23/20): In response to the member's concern, generally, neither the new federal law (effective, April 2) nor the state law, in effect now, would require employers to provide sick leave in an instance where business is shut down generally. In order to trigger the paid sick leave requirements, an employee, generally, must be ordered to be subject to quarantine/isolation by government for COVID-19. The federal law triggers (April 2), are a little broader than the state triggers, but generally the answer is no. In other words, the Governor's EO requiring business, except those designated as essential, to

have people working remotely, would not require payment of sick leave under the new requirements of the federal or state law.

Q (Pt 2): Thanks for your response. I understand that I would not be required to offer Federal Paid Sick Leave.

My follow up question would be

- under the same circumstances, if I chose to pay the Federal Paid Sick Leave, would I be disqualified from receiving reimbursement?

A (Pt 2) (3/26/20): We are in the process of refining this, under the federal rules. This rule will not go into place until April 1 and would not be retroactive at this point. There are going to be federal tax credits to employers who **have** to pay sick leave. But it will have to be for one of the “triggers” under the federal law, which are less stringent than that of the State law triggers, effective March 18; there are no state tax credits at this time.

A (Pt 2) (3/27/20): With regard to ... question on tax credits for sick leave paid to his employees. An employer will only be able to claim a credit for “qualified” sick leave and family and medical leave benefits. Qualified benefits are those paid to employees pursuant to the specific provisions of the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLEA”). If he is looking “to pay his employees sick leave even though he’s not required to,” he will likely not qualify for a credit. He will want to seek individual legal and tax advice to make sure he is in compliance, but we have outlined the general rules below:

Qualified Benefits include:

Under the EPSLA, an employee may qualify for benefits when he or she is unable to work or telework for one or more of the following reasons:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
- (3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.
- (6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

For the above qualified events, the amount of leave available to employees is based on the number of hours they work in a typical 2-week period and their regular rate of pay. Full time employees would be

eligible to 80 hours of leave. The number of hours for part time employees would be prorated based on the number of hours they usually work. The dollar value of the leave is calculated by multiplying the number of hours the employee is entitled to by their regular rate of pay, up to the following caps. For leave that qualifies under reasons (1), (2), and (3) above, the employee may be paid up to \$511 per day and up to \$5,110 in the aggregate. For leave that qualifies under reasons (4), (5), and (6) above, the employee may be paid up to \$200 per day and \$2,000 in the aggregate.

Under the FMLEA, an employee may be entitled to benefits when he or she “is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.” An employee who qualifies under this provision is entitled up to 60 total workdays of leave. The first 10 days of this leave would be unpaid, but an employee may use his or her leave accruals (if any) to cover this time period, including sick leave pursuant to EPSLA. For any qualifying leave needed beyond the first 10 days, the employee would be paid at 2/3rds their regular pay for up to 50 additional days at a maximum \$200 per day and for an aggregate maximum total of \$10,000.

Note, for both of these leaves an employer can decide to exempt employees who are “health care workers,” which are defined as any workers who are “authorized to diagnose and treat physical or mental health conditions,” as well as “first responders.”

Tax Credits

The tax credit corresponding with the EPSLA mandate is a credit against the employer’s 6.2% portion of the Social Security (OASDI) payroll tax (or against the Railroad Retirement tax). The credit amount generally tracks the \$511/\$5,110 and \$200/\$2,000 per-employee limits described above. The credit can be increased by (A) the amount of certain expenses in connection with a qualified health plan if the expenses are excludible from employee income and (B) the employer’s share of the payroll Medicare hospital tax imposed on any payments required under the EPSLA. Credit amounts earned in excess of the employer’s 6.2% Social Security (OASDI) tax (or in excess of the Railroad Retirement tax) are refundable

The tax credit corresponding with the EFMLEA mandate is a credit against the employer’s 6.2% portion of the Social Security (OASDI) payroll tax (or against the Railroad Retirement tax). The credit generally tracks the \$200/\$10,000 per employee limits described above.

Exemption for employer’s portion of any Social Security (OASDI) payroll tax or railroad retirement tax arising from required payments. Wages paid as required sick leave payments because of EPSLA or as required family leave payments under EFMLEA aren’t considered wages for purposes of the employer’s 6.2% portion of the Social Security (OASDI) payroll tax or for purposes of the Railroad Retirement tax.

Employee Health Status Disclosure

Q: Dr. XYZ has an employee who let her know that she had lunch recently with someone who now has the virus. The employee said she would be getting tested herself, but she has not yet let Dr. XYZ know what her results are. Is the employee required to tell her? Their office is currently closed so all of their communications have been via text, and she has not responded to Dr. XYZ’s texts.

A (03/31/20): The guidance we have seen is that the individual should be in contact with their local department of health. Each local department is listed on the NYS Department of Health web site. The local Department will guide this individual on how to deal with any notification. There is no requirement that the individual tell the employer, as this relates to her health and is protected. If the local department determines that they must notify individuals, if she tests positive, they will make that judgment.

FOLLOW-UP QUESTIONS FROM 4/1 NYSOA WEBINAR

Q: How does filing for unemployment work for our private practice (husband and wife ownership)? We don't have ourselves on payroll, but I know they are making exceptions for this crisis.

If one of us sees emergencies (very few) can you get partial unemployment?

If one of us does office work for example, pay bills, answer messages etc. can you still be on unemployment?

A (04/06/20): Thank you for your question. Many things are being revised and implementation is and can be uneven. We can only give you general guidance on this and if you need individual representation, you should consult an individual attorney. In terms of your question, how an "owner" will be treated under the revisions to Unemployment Insurance (UI) by the federal rules is still a question that is not answered. These rules, even if they do cover an owner, will provide UI to states (and individuals) through July 31, as it currently exists. Assuming you as owners could or will be covered, there is the ability to obtain partial UIB. However, there are caps and if you are eligible and seek benefits the benefit may not be greater than the payments you are receiving privately. There is no downside to applying, however, but there is a chance owners may not be covered.

Q: Do I qualify for unemployment if I work 1 day per week for SUNY Optometry but am furloughed at my 4-days-per-week job?

A (04/06/20): Thank you for your question. Many things are being revised and implantation can be potentially uneven. We can provide general guidance, but you may want to seek an individual attorney for your specific situation. Generally, there is no downside to applying for unemployment insurance (UI). There is the ability to obtain partial benefits, though there are limits on the amounts. In addition, UI could treat a furlough as an indication you are still employed. It may depend on what your employer is willing to indicate when they are asked. All the same rules on an employer providing information when an employee applies still applies to this situation. In other words, an employer is asked what happened with the employment and if the employer answers that the employee was furloughed, UI may not treat this as an eligible situation. Again, there is no downside to applying, though it is heavy volume and may take some time.

Q: Thanks for all your valuable information during the webinar. I have an office located inside of a Costco and I am the only fulltime employee (I have an S-corporation). How do I calculate equivalent fulltime employee hours when the rest of my staff work part time? They all are paid hourly. This includes

1 office manager, and 4 part-time assistants and an O.D. that works for me once a week. Would I try to separate doctor's hours from assistant hours? Would I need to account for an O.D. that works for me 1-2 days a month? Do I count each employee, or would I take the total hours of a work week and divide it by 35 or 40 and that would equal 1 fulltime equivalent employee? I'm afraid that the Covid-19 virus will affect us for more than 8 weeks and I won't be able to afford to keep all my staff when we can reopen. I currently have my office manager doing some work and have furloughed the rest of the staff. I would like to have some idea how I would figure out how much of my loan would be forgiven if I don't hire everyone back or reduce their hours.

A (04/06/20): Thank you for your question. It is not clear what your specific question is, but we assume you are asking about the calculation for a loan/payment/grant under CARES? While much of the details are unclear, as we indicated in the webinar, this particular program is, well, evolving. Generally, up to 2.5 times average monthly payroll, up to a maximum of \$10,000,000, is calculated based on average total payroll costs incurred during the year before the loan is made. While you might want to seek specific guidance from an accountant or individual attorney, our general guidance is to make a reasonable judgment on the calculation (the programs cap inclusion of salary at \$100,000). The program also includes rent, if any, and utilities. Once you have made a judgment on how to calculate the hours, you should make sure that you account for this in the next 8 weeks so any audit of the loan/grant can be justified. This does not address the ability to actually see patients and obtain payments, a question that is beyond the scope of the federal rules but has been dealt with by Executive Orders generally.

Q (Pt 1): I employ several ODs who earn more than \$100,000 each. I understand that the portion of the salary that is greater than \$100,000 would not count towards the average monthly salary that determines the loan amount. In order to hire them back when there is really no revenue, I would have to reduce their salary to \$100,000 either by reducing their hours or their rate. If I reduce their hours, would this affect the FTE count that is also required for forgiveness of the loan, or because they earn over \$100,000, will not?

My understanding is that you must maintain the Full-Time Employee rate as you had it during some period before the loan.

A (Pt 1) (04/06/20): Thank you for your question. While we can only provide general guidance, as information is modified relatively quickly, you may be benefited by working with an accountant or a lawyer on your individual situation. The new SBA program loan/grant does limit the salary calculation at 100,000. In addition, utilities and rent can also be expenses to be used to calculate the amount you might seek. Generally, up to 2.5 times average monthly payroll, up to a maximum of \$10,000,000, is calculated based on average total payroll costs incurred during the year before the loan is made. In terms of FTE, we advise that you make a reasonable judgment on this, particularly if there is no actual routine visits being performed (there are State rules on being open as an "essential business" and this may, of course, limit what type of work you can perform; this is an entirely different issue). Again, we can only provide general guidance and you may be served by an individual consultation going over all your options.

Q (Pt 2): Thanks for your response. I am not sure I understand your point about the FTE. Does it mean that because we are not performing routine examinations, we cannot justify keeping the full staff

employed? My understanding is that the objective was to keep people employed irrespective of the amount of work there is. There was clear in the AOA seminar. Neither the lender nor the SBA was able to answer my question.

A (04/09/20): Thank you for the follow-up question. I think we are confusing two things. The SBA program is, as you indicate, designed to keep individuals employed, irrespective of the amount of work there is or whether you can operate. The only issue we were commenting on, which has nothing to do with the SBA loan/grant, is a New York State issue of a business being “essential” and allowed to operate in a physical location and see patients. We apologize for the confusion. The SBA program does not deal with how you may be operating, just that you are paying individuals.

Q: My office is closed, and all employees are on unemployment. I am going to sign up this week for myself as I am also an employee of my S corporation. I am spending maybe 1 or 2 hours per week seeing emergency patients. When I sign up for unemployment do I record those hours?

A (04/09/20): This is general guidance. In terms of telling the Department of Labor, we don’t believe the application is that specific. We would advise that you fill out the application to the best of your ability. In terms of an eligibility determination, even if you have some work, UI does provide for partial payments.

Q: My bank just told me that I was approved for SBA loan thru CARES act. Most likely I will not be hiring my employees back till mid-May. And I want to leave my employees on unemployment till then. Do I need to tell my bank a start date? I don’t want to start my 8-week period until all of my employees are hired back.

A (04/09/20): As you can imagine, the Guidance is being modified and refined fairly quickly and we can only give you general guidance. We don’t know if you “need to tell your bank the start date,” but the real question is can you “pick” an eight-week period for the forgiveness period? We would advise you to seek specific guidance from an individual attorney or accountant, but the interim Guidance does not answer this question directly but has some information. To assist you, the following interim guidance just states that it is “over the eight-week period following the date of the loan.” One could interpret this as after the loan is funded generally or specifically the weeks immediately after the loan is funded, but you should seek specific guidance. We certainly understand the confusion, but the loan forgiveness is designed to have employers use the funds to pay (at least 75% of the total loan) employee salaries. The best source for information is the Interim Guidance from the SBA, the agency implementing this program. This Guidance can be found on the Small Business Administration’s web site. This issue was only addressed in in section 2 O and, in relevant part, states:

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll

costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, **over the eight-week period following the date of the loan.** However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount **75 percent of which is equivalent to eight weeks of payroll** (8 weeks / 2.5 months = 56 days / 76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness. As we understand the guidance (or lack thereof) at this point, we understand the you can select the 8-week period.

Q: I read that the 8-week period for the PPP began Feb 15 and goes thru June 30 and that you can pick what 8 weeks you want to use. Once I begin the application, do I still select what 8-week period I want to use for forgiveness? Some sources say that the clock starts ticking as soon as you receive the money. One source said that "the 8-week period begins on the date of origination of a covered loan. This 8-week period may be applied to any time frame between Feb 15, 2020 and June 30, 2020. Borrowers can choose which 8 weeks they want to count towards the covered period."

A (04/09/20): * It is a little unclear, based on the current guidance, if an applicant can "pick" whatever eight-week period they want. We refer you to the Interim Guidance from the Small Business Administration as the best source for guidance as opposed to general articles and information as the SBA is the Agency in charge of this program and is the official source. We note that Section 2 O of the Interim Guidance discusses this issue generally and may give you the best Guidance on this issue.

Q: As a practice owner (we have 3 partners), are we able to apply for unemployment (partial) since we have gone from working full-time to each working 3-4 hours a week? Can this be done thru the usual unemployment application? Is it true that I cannot do it before April 10?

A (04/09/20): * We refer you to the NYS Department of Labor application for UI. You should fill out the Application as required.

Q: If an employee's hours have been cut from 40 to 9 hours a week and then that employee has to go on quarantine after they started working those reduced hours for more than a week, are they paid for their sick time based on the reduced hours?

A (04/09/20): * This is hard to answer specifically without more information. However, generally, if an employee was “quarantined” for COVID-19, there are specific requirements under NYS (effective March 18) and federal law (effective April 1) for sick leave and this depends on a variety of elements, which is why specific representation is best. Generally, NY’s rules depend on why the employee was quarantine, who the order is from (needs to be from an authorized government authority) and what the employer is required to do will depend on how many employees the employer employed as of January 1, 2020. The federal program, effective April 1, has more relaxed triggering events. Your question suggests that you are asking about Paid Time Off provided by the employer in this case, but if the individual situation falls within either the state or federal sick leave COVID-19 rules, the employer PTO would not be relevant yet.

Q: Can a salaried employee (optician) come in and work partial hours? If so, how are they paid. Is there any difference in pay if they come in and work one 8-hour day vs two 4-hour days?

A (04/09/20): * This is hard to answer with limited information. Generally, the employer sets the pay and hours of an employee. Absent a specific employment agreement, an employer can set the pay and hours within certain limits. There are minimum wage rules that could be implicated depending on the actual hourly amount being paid.

Q: For an employee who is furloughed, how long can they maintain health insurance thru the office. Currently, the office pays a portion and the employee pays a portion. We were planning to continue to pay the office portion and have the employee write a check for her portion.

A (04/09/20): * This is hard to answer as well. We are not aware of any specific time limit on this and it depends on how you want to structure this situation. As an employer, you are able to determine how long you want to pay for a portion of the employee health insurance, unless there is a specific agreement in place that requires a specific length of time.

**Given the specificity and variety of your questions, we strongly suggest you seek individual representation with a qualified employment lawyer. We can only provide general guidance relative to UI and the PPP loan. Given your specific questions, answers may change (especially with the UI and PPP loan). Much of what you are asking are business judgments about how to proceed and these are questions we do not opine on specifically. However, we provide the general guidance on your questions to the best we can, given the limited information.*

CARES Loan and Independent Contractors

Q: I have a question about the new CARES loan in regard to independent contractors.

I'm afraid there is a subset of your members who may have a more difficult time obtaining financial assistance. These are the doctors who are paid solely as 1099 in a variety of settings.

My personal situation is that I work for a private practice as an independent contractor. My expenses are low, and I'm not set up as a business. I am paid as 1099 and pay my quarterly taxes. My paychecks

go into my personal banking account. Many of my younger colleagues work like this as well. They possibly work at multiple offices both private and retail.

I have found that banks want a personal “business” relationship with applicants in regard to the CARE loan. Many ICs, such as I, probably don't have a business account.

Could you offer guidance for this group? Banks are probably less willing to pay out for individuals who don't have employees. I personally would only use loan for my salary as would many ICs in my situation.

A (04/10/20): As we understand your question, you are wondering if, as a 1099 independent contractor, you would be eligible for to apply to the PPP program? While this is very general advice, not specific to your situation, the best Guidance is contained in the Small Business Administration Interim Guidance. This is the Agency in charge of this program. Under that Guidance, for eligibility, it states (the highlight is ours):

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship **or as an independent contractor or eligible self-employed individual, you were in operation on February 15, 2020.**

You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

It would appear you would be eligible for the PPP program. In terms of whether you have the documentation, or a bank will or will not work with you, we are unable to provide any guidance on that. You would have to provide the requested documentation to the SBA bank taking the application.

You may also be eligible, under the federal expansion rules of unemployment insurance (administered by NY), for Unemployment Insurance. While there are significant delays in actually obtaining benefits, which may be as much as \$1,100 (with the addition of the \$600 from the federal government), due to the volume of the applications, it may be a route to consider. If you are looking for specific answers and guidance on UI, the NY Department of Labor is the NY entity that administers this program and the application is online. We understand, given the complaints on the delays, the State has added staff and revised the web site to try and address the delay. If you are eligible, the payments are retroactive to the application date and the state has waived any “waiting period” (usually 7 days), though getting a check, given the volume, will likely take some time. But, independent contracts, while not normally eligible, have become an eligible classification under the temporary federal expansion of the program.

FOLLOW-UP QUESTIONS FROM 4/13 NYSOA WEBINAR

Q: If PPP funds are dispersed well before my office is able to reopen, can I bring my employees back late in the 8 week period and pay them double or triple their regular salaries as advances on future wages? How would this affect loan forgiveness both from an FTE and 75% of wages perspective?

A (04/15/20): While the Program details are not absolutely clear on this point, the interim guidance seems to suggest that the employer’s loan forgiveness period would begin following the date of the loan. The Interim Guidance provides that:

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.

This Guidance suggests that the 8-week period begins following the date of the loan. While this could be interpreted differently, we suggest you seek individual advice from an accountant or lawyer regarding the loan forgiveness period to be used.

Q: When applying for UI as a sole proprietor, if I am staying home to look after my children because schools are closed, do the children have to be of a certain age?

A (04/15/20): There are two different programs at work in UI, the regular NY program and the enhanced federal programs administered by New York. To be eligible for NY unemployment an employee must lose their job through no fault of their own. The child’s age is not part of the eligibility determination. Under the enhanced federal programs, administered by NY, independent contractors and self-employed individuals may be eligible for UI and a child’s age is not part of this determination. For more detailed information on eligibility, see www.labor.ny.gov/ui/employerinfo.

Q: I was just informed by SBA that the EIDL will not be \$10,000 which I had applied for. I will only receive \$1000 if I am eligible. They also suggested looking into the PPP loan. Is a sole proprietor (Schedule C) with no employees able to apply for the PPP?

A (04/15/20): The best Guidance on this is the interim rule established by the Small Business Administration (SBA). On this eligibility point, the rule indicates that:

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020. You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099–MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

Q (Pt 1): During the webinar on April 13 it was mentioned that as employers, we need to fill out a shared work application with the New York State unemployment department. This was the first we had heard about that so, when we went to do this application it says that the employer must do this at least three weeks before the employee starts sharing work. Is there an exemption for this now for COVID-19? We had already started an employee on shared work before knowing we needed to do this application and certainly have not been able to abide by the three-week guideline.

A (Pt 1) (04/15/20): The Shared Work Program, administered by the NYS Department of Labor, does require an application and a plan to be filled out by an employer to take advantage of the program benefits. The best source for the program requirements can be found at www.labor.ny.gov/ui/employerinfor/sharedwork. In the frequently asked questions section, it states that the plan cannot be retroactive, see, www.labor.ny.gov/ui/employerinfo/sharedworkfaq.shtm#o. We are not aware that this requirement has been waived.

Q (Pt 2): I need to know how to move forward. We did not realize that we had to fill out an application for the Shared work program and we have one employee who has already been on it for 2 weeks and has received pay. We have another who just we onto it. We have not received any requests from the dept of labor to certify hours on these employees or the ones on full unemployment. Do I still fill out the application even though it is after the fact and they have been receiving partial pay? Are we in violation of something? Do we have the employee stop collecting unemployment? Will they have to pay it back since the paperwork was not filled out beforehand?

A (Pt 2) (04/17/20): Under the UI Shared work program, an employer does have to submit an application. The best general advice we can provide is that the Plan must be submitted at least one week before but not more than four weeks before implementation. We can refer the member to seek individual counsel if they are in a position of implementation outside the official guidelines. A general outline of the requirements, includes:

The Employer's Application:

An employer has to design a Shared Work Plan and complete an application. This can be done online through the UI Online Services or by submitting the application via mail or fax. DOL states it will be able to process the application faster if its submitted online.

The application is comprised of two parts. The first is the Application itself (SW-2.1) and the second is a Participant Listing (SW-2.2).

The Application must include:

- A certification that during the plan, the employer won't eliminate or diminish health and medical insurance, retirement benefits or any fringe benefits provided to the employees prior to the application UNLESS such benefits provided to employee that do not participate in the plan are reduced or diminished to the same extent as those participating in the plan.
- A certification that the collective bargaining agent has agreed to participate in the plan;
- A certification that if not for the plan the employer would reduce its work force to a degree equivalent to the total number of working hours proposed to be reduced or restricted for all included employees;

- A certification that it will not hire additional employees (part or full time) for the affected work force while the plan is in operation;
- A certification that no participant of the plan shall receive more than 26 weeks of benefits (exclusive of the waiting week);
- A description of how workers will be notified of the plan prior to it taking effect, if feasible. If not feasible, the application has to provide an explanation why;
- An estimate of the number of works who would be laid off if the employer could not participate in the shared work program; and
- A certification that the plan and implementation will be applicable with federal and state laws.

The Application can be found here <https://labor.ny.gov/formsdocs/ui/sw2.1.pdf> – it:

- Includes all of the certifications outlined above; and
- Can be submitted at least one week but not more than four weeks before the plan is implemented.

PPE Loan Forgiveness

Q: Do you have to reinstate payroll and use the loan by June 30 (the 8 weeks after loan origination)? We already had all staff on furlough before we applied and received PPE loan.

Information from our accountant indicates that as long as we reinstate all staff by June 30th we do not have to follow the other guidelines that force us to request staff remove themselves from unemployment this week.

A (05/01/20): As we understand the Guidance from the SBA, the official agency in charge of the PPP, once the loan is funded, the eight-week period begins after that relative to the “forgiveness” period. If your accountant is providing you Guidance specifically that this is not the case, I would ask if this is consistent with the SBA Guidance. The consequence is, if a portion or all the loan is not “forgiven”, it will turn into a loan for two years (deferred for six months) at 1%.

The Relevant Guidance, conservatively interpreted, is found in the Interim Guidance by the SBA at 2 o:

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan.

Patient Waiver and Release of Liability

Q: What is your thought on requiring waiver and release of liability before patients come in? We are aiming to open for routine care in June. We are located in NYC.

A (05/06/20): While you can add a waiver to attempt to release liability against your office for patients that come in, the viability of that release, if used as a defense, may not hold up. Under general tort principles, a claim must have four elements: a legal “duty” is in place (here, that would likely be compliance with CDC and DOH guidelines); that “duty” was not followed (here, the patient would have to show you did not follow appropriate guidelines); that “failure caused” some type of legally recognized harm (the patient, in this case, got the COVID-19 as a result of that failure, for instance); and, there was some economic damage to the patient that can be proven. Even if a potential claimant makes out the case for these four principles, however, you can raise many defenses, including the patient “assumed the risk” (maybe they did not follow the guidelines by not wearing a mask) or they signed a “waiver” of the risks. In the case of a waiver, however, courts, under general tort principals, are reluctant to allow most waivers of liability as an ultimate defense of a claim. Nonetheless, there is no harm in putting a patient on notice of this policy, though it may not ultimately result in no liability.

However, we would advise generally, that you ensure you are taking appropriate steps, consistent with CDC and NYS DOH Guidance, on making sure the office is clean and any restrictions are properly followed. This will assist in any defense of a claim in this environment. For instance, making sure your employees are wearing masks and making sure you have masks for patients if they do not have one (and insisting as a practice that patients where masks) will assist in any defense of a claim that a patient seek to bring. In addition, checking with your general liability insurance company and making sure you have coverage and you are compliant will also go a long way to making sure you are covered in the event a potential claim arises.

I believe that NYSOA and AOA has some suggested guidance on how offices should go about re-opening when that can occur in NY. These suggestions, together with a discussion with your insurance company, may assist in doing as much to prevent infection, but also provide a reliable defense in the case a claim does arise.

We note, however, that the guidance NYSOA has received to date indicates that optometry practices may only see patients with “urgent” needs, and other patients should be seen via telehealth until New York State permits the broader reopening of in-person business. Until there is further guidance on reopening from New York State, the limitation on only seeing patients in person with “urgent” conditions remains in place.

Optometric Case in Nursing Home Settings

Q: I provide optometric care in nursing home settings. I am writing to gain guidance on special considerations for nursing home eye care.

Since the onset of the coronavirus in March, I stopped routine care and advised the nursing homes that I service that I am only available for urgent and emergent care. This past week, I watched the AOA webinar on re-opening optometry practices. While the webinar was informative, the presenters advised

that the re-opening guidelines are state specific, and we should contact our state associations for specific guidance.

Yesterday, I spoke with an optometrist colleague in Florida who has been in contact with the Florida Optometric State Association. He was advised that he is now free to see all medical examinations, as all medical examinations were deemed essential. I wasn't aware of this interpretation and thought we were limited to urgent and emergent care. What is the New York State Optometric Association's stance on this?

All of my examinations are a result of a medical order and are medical in nature. Although all the examinations are not necessarily urgent. Is it prudent to now seeing patients who have medical diagnoses? This would encompass all of my patients. If the guidance is to wait, then when is it prudent to see non urgent eye care for nursing home patients (phase 1, 2, or 3)? The nursing homes are asking for my services, yet I want to make sure I have the proper guidance before I proceed. Any and all help that you could provide would be greatly appreciated. Many thanks in advance :)

A (05/06/20): The guidance NYSOA has received to date indicates that optometry practices may only see patients with "urgent" needs, and other patients should be seen via telehealth until New York State permits the broader reopening of in-person business. Until there is further guidance on reopening from New York State, the limitation on only seeing patients in person with "urgent" conditions remains in place. There is no distinction made between medical and non-medical diagnosis in this guidance, and but rather the restriction applies to the practice of optometry. There will likely be more guidance forthcoming as individual regions within the state are permitted to phase in in-person business operations (with some regions possibly beginning on May 15th with manufacturing and construction (but not professional services in this initial phase)).

In addition, nursing homes remain a hot-spot for COVID-19 cases, and in New York, all visitation has been suspended (except for medically necessary care). It would be wise to check with individual nursing home, but it is likely that they are not looking to bring in any additional services to comply with the NYS DOH guidance at this time.

PPP, Liability Insurance, Unemployment Benefits for Employees

Q: I was able to secure funding thru PPP last month. My office is open for urgent and emergent patients and has been since the end of March. My practice is quite small, so I have only two part-time employees. When I was completing the PPP application, I anticipated that each of my employees would return to assist with typical administrative matters. They do not participate in patient care. Well, to my surprise, neither of them seems to want to return. They cannot tell me if this is temporary, more long term, or permanent. Am I obligated to pay these employees even though they are not coming to work? Can I, instead, hire other employees to fill my staffing needs and use the PPP funds to meet the requirements of "loan forgiveness?"

A (05/13/20): Under the PPP program, there is no requirement that you pay the "same" employees that you used to calculate the amount of the loan from the previous year's payroll. What your bank will be looking at, in terms of forgiveness, is that at least 75% of the loan disbursements were used to pay payroll costs (capped at \$100,000 annualized per employee) over the eight week period from the date of disbursement. In answer to your question, you can hire different employees to perform the work, for

purposes of loan forgiveness. For any portion that is not forgiven, it would turn into a two-year loan at 1%, payments being deferred for six months. If any portion is not forgiven, you can simply return the remaining funds, pay off a higher debt or just pay it back, pursuant to the terms of the SBA terms.

In terms of those employees that will not return to work, you should make a decision regarding their employment with you. Without knowing more, it is hard to say how you would move forward and you should seek specific legal guidance if you are intending to terminate. Generally, if an employee is refusing without any specific medical documentation to return to work, you can terminate this individual.

Q: I filed a claim with my Liability Insurance Carrier (The Hartford) based on communications received from NYS concerning potential coverage for loss of income due to business interruption caused by the actions of a government entity. The claim was denied, but the reason was, to my mind, flawed. Without provided too much additional detail, I would like to ask the NYSOA legal consultants opinion concerning their decision.

A (05/13/20): We can only provide general guidance on this and have not reviewed the policy, or the claim submitted. Generally, there are provisions in business interruption policies that may exclude claims based on events beyond anyone's control. These are referred to as Force Majeure clauses (or acts that are excluded due to acts of god or, perhaps, even a government shut down for a health emergency, such as we are experiencing in NY). You would have to look at the reason for denial and determine if the reason for the exclusion is included in the policy in effect at the time you made the claim. In the event you disagree with the decision, there are policy requirements to file an appeal and you should seek specific legal counsel to determine if you might have a viable claim to appeal with the insurance company.

Q: A former employee filed for unemployment benefits on 4/20/20. I received notice of this from NYS Dept of Labor just yesterday 5/4/2020. The notice said I had 10 days from the date of the filing to respond. I called the dept. concerned about the delay in receipt of the notice. They asked that I respond as quickly as possible. I should note in my response the delay in delivery of the notice due to the mails. The former employee simply stopped coming to work after 8/8/2019. I responded to the NYS Dept of Labor telling them what I have noted here with some other details to try to corroborate this fact. I also noted in my response that I currently have some staffing issues (see question #1), and there is a position in my office for this employee. Is there anything else I should do?

A (05/13/20): It is hard to give you a specific answer on this, but, if the employee stopped coming to work and you stopped paying this individual, the individual may assume they were terminated in which case, they could file for unemployment insurance (UI). As an employer, you are required to answer the questions asked by the Department of Labor (DOL), the agency in charge of UI. It appears that you answered honestly and truthfully. If the employee was collecting a paycheck from you and filed for UI, that would (or should) disqualify them for benefits and would be the employee's problem.

From your perspective, the employer, if you are still paying them and they are not showing up for work, we noted in 1 above, you should seek individual legal counsel and make the appropriate arrangements/decision regarding their employment.