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RESPONDING TO THE CORONAVIRUS (COVID-19)

TOP-OF-MIND EMPLOYEE BENEFITS QUESTIONS FOR EMPLOYERS

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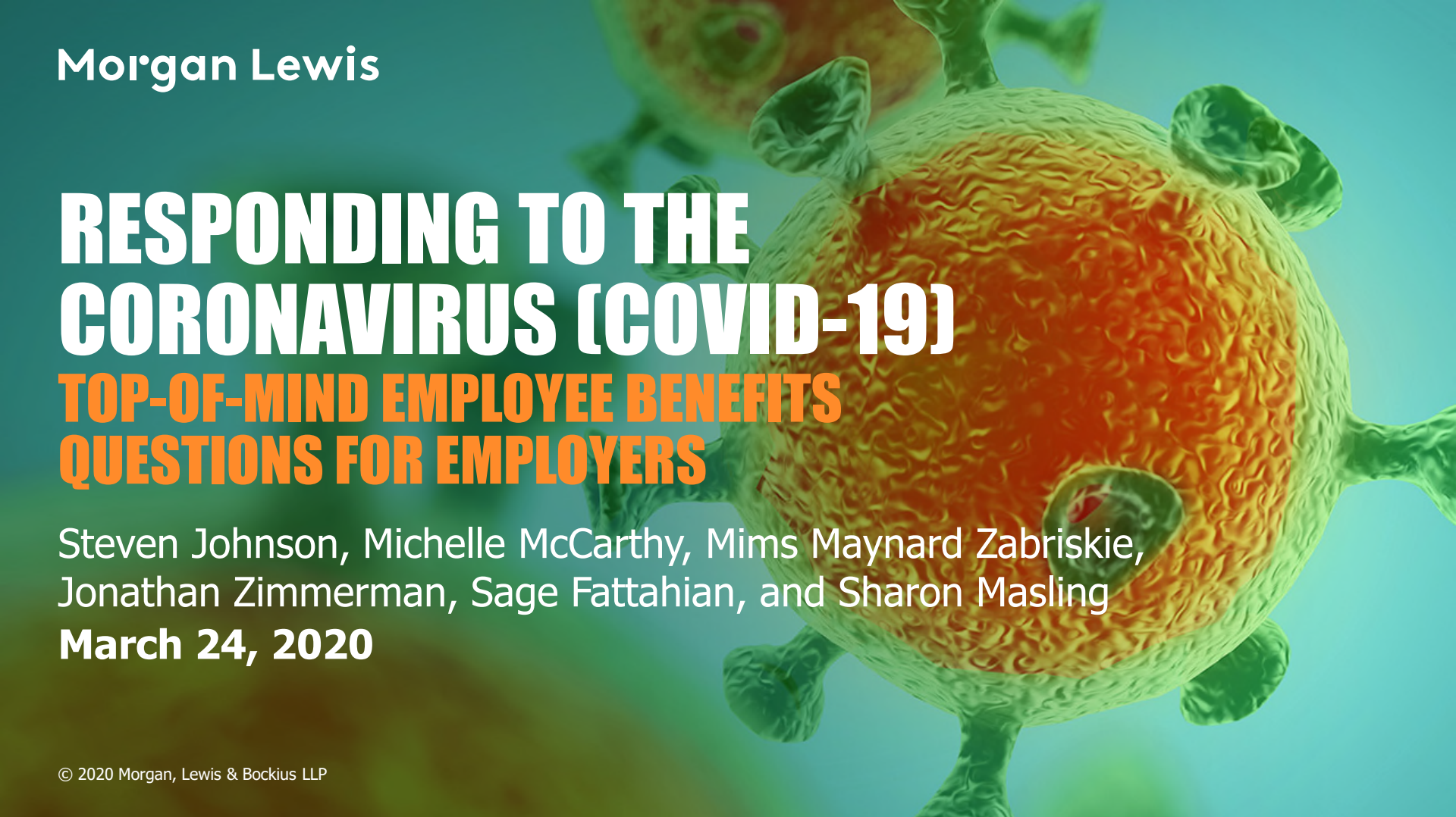

COVID-19 & HEALTH PLAN COVERAGE

Coverage of COVID-19 Testing

- **Families First Coronavirus Response Act**
  - **Requirements:**
    - Requires group health plans provide coverage for COVID-19 diagnostic testing at no cost-sharing
    - Includes cost of healthcare provider visits (including telehealth), urgent care center visits, and ER visits
    - Effective March 18 through the duration of the public health emergency declaration period
    - Note: state law mandates for fully insured plans
  - **Employer Action:** Amend group health plans to comply with coverage requirements

Coverage of COVID-19 Testing

- **Families First Coronavirus Response Act**
  - **Employer Questions:**
    - Is COVID-19 diagnostic testing coverage covered regardless of where the services are provided (out-of-network providers)?
      - Employer may decide to cover at no cost-sharing regardless
      - Other employers may decide not to cover, keeping in mind that future guidance may require re-adjudication of claims
    - Can an employer cover COVID-19 testing for those employees not in the group health plan?
      - May be covered under a spouse's plan

Coverage of COVID-19 Testing

- **Families First Coronavirus Response Act**
  - **Employer Questions:**
    - How do we handle telehealth?
      - Telehealth services related to COVID-19 diagnostic testing must be offered at no cost-sharing
      - Issues for employers: TPAs are informing employers that they will offer all telehealth services at no cost-sharing or the employer can opt-out all together
        - Present compliance issues for employers with a High Deductible Health Plan
        - TPAs must find a way to administer the telehealth services for their clients in a High Deductible Health Plan

Coverage of COVID-19 Testing

- **Families First Coronavirus Response Act**
  - **Employer Questions:**
    - Issues for employers:
      - IRS Notice 2020-15: can be read to extend to telemedicine services
      - The Notice does not extend other medical treatment for telemedicine: these still do not work in an HDHP/HSA context before individual hits deductible
      - Proposed legislation

Coverage of COVID-19: Coverage

- **What can employer-sponsored, group health plans offer? Does it have to be limited to testing only?**
  - Self-insured Plan
    - Employers can amend the plan to cover COVID-19 treatment as well
    - Paid from employer general assets
    - Stop-loss considerations
    - Works in a high-deductible health plan
      - IRS Notice 2020-15 (permits coverage for testing as well as treatment)
  - Fully insured health plan
    - Unless mandated by the State: Need to consult with carrier

COVID-19: Employer Coverage Questions

- **Employer Questions**
  - **We are reducing hours for a majority of employees to 20 hours per week. Our current health plan eligibility requires employees must work 30 hours per week to be eligible. Do we have to offer COBRA coverage or can we allow these impacted employees to continue coverage under the plan?**
    - A reduction in hours that triggers a loss of eligibility under the plan is a COBRA qualifying event and COBRA must be offered
    - However, the employer can amend eligibility prospectively under the plan to permit impacted group to continue coverage
      - Issues: will this pull in additional employees who were not otherwise eligible under the plan?
      - Issues: stop-loss coverage

COVID-19: Employer Coverage Questions

- **Employer Questions**
  - **We are instituting a furlough; is this a COBRA qualifying event?**
    - A furlough is a reduction in hours, which triggers a loss of eligibility and coverage under the group health plan
    - This will be a COBRA qualifying event (reduction in hours + loss in coverage)
    - Caution: employees in a stability period under ACA shared responsibility
      - Generally can't lose coverage in a stability period
      - If stability period is cut short: potential ACA penalties
      - 2014 special enrollment opportunities allow a voluntary drop of coverage

COVID-19: Employer Coverage Questions

- **Employer Questions**
  - **Can we permit employees on furlough to continue coverage under the group health plan?**
    - Absent a specific exclusion of coverage for furloughed employees, an employer can treat this as an authorized unpaid leave of absence and permit employees to continue coverage under the group health plan during the period of furlough
    - Fully-insured plan considerations

  - **We are permitting furloughed employees to continue coverage under our health plan until the end of April only. If they remain furloughed May 1 and we discontinue their coverage, must we offer COBRA coverage?**
    - Yes; this will result in a COBRA qualifying event, even though the loss of coverage happened after the reduction in hours

Self-Insured Health Plans & COVID-19

- **Self-Insured Plan Benefit Design Changes**
  - Waiver of participant co-pays and deductibles for *all* telemedicine or medical visits related to diagnosis of COVID-19
  - Waiver of prior-authorization for COVID-19 testing
  - Continuation of benefits for laid-off/furloughed employees
  - No employees/plan termination
- **Stop-Loss Considerations for Self-Insured Health Plans**
  - Claims administration/timely submission of claims
    - World Health Organization findings based on China's outbreak
      - 15% of patients require supplemental oxygen (typically via hospitalization)
      - 5% require artificial respiration (typically requires ICU-level hospitalization)
    - Hospitals unlikely to timely submit claims for COVID-19 patients
    - ***Review stop-loss renewal terms and tail coverage***
  - Waivers of co-payments/deductibles not otherwise required by law
    - May not apply towards individual or aggregate attachment points
    - Coverage outside normal plan design
    - ***Review stop-loss policy terms before amending self-insured plan***

COVID-19 & HIPAA CONSIDERATIONS

As Applicable to Employers Generally

HIPAA & COVID-19

- **Protects individuals' medical records and other personal health information**
- **State privacy laws**
  - HIPAA preemption
  - State law applies if it is more stringent
- **Applies to covered entities and their business associates**
  - Health plans, healthcare clearinghouses, healthcare service providers that conduct standard electronic transactions and their service providers
- **Excludes employment records**
  - Records needed for the employer to carry out its obligations under the FMLA, ADA, OSHA and similar laws; and
  - Files or records related to occupational injury, disability insurance eligibility, sick-leave requests, workplace medical surveillance, and fitness-for-duty tests, including COVID-19 testing/temperature screenings of employees
- **HIPAA authorizations**
  - Providers may disclose COVID-19 test results to employer pursuant to authorization
    - Employee may revoke authorization; however
    - Provider may refuse to perform COVID-19 testing (under HIPAA) without authorization
  - Employer may condition employment on provision of HIPAA authorization

HIPAA/COVID-19 HHS Guidance

- **Office of Civil Rights (OCR) February 3, 2020 Bulletin**
  - HIPAA Privacy Rule still applies during COVID-19 outbreak
  - HIPAA specifically includes exceptions for these types of occurrences
- **March 15, 2020 HHS Bulletin**
  - Waivers for hospitals/COVID-19 disaster protocol implementation
  - Reiterates privacy/disclosure rules applicable during COVID-19 pandemic
- **Permitted Disclosures**
  - **Treatment and Operations**
  - **Public Health Activities**
    - Public health authorities
    - Direction of public health authorities to foreign government agency
    - Persons at risk where state law does not preclude disclosure
  - **Notification to Family, Friends, and Others Involved in Individual's Care**
  - **To Prevent or Lessen Serious and Imminent Threat**
  - **Minimum Necessary**

Safeguarding COVID-19 Records

- **Reasonable Safeguards Under HIPAA**
  - Applies even in disaster situations
  - Includes administrative, physical and technical safeguards for electronic PHI
  - Access Controls
    - Appropriate access
    - Extra protections for COVID-19 patient records
    - Audit logs for inappropriate access
    - Actions where a violation occurs
- **Safeguards Where HIPAA Doesn't Apply**
  - Health information provided to employer under FMLA/OSHA/ADA
  - Confidential medical information under ADA
  - Must be kept in separate, confidential medical file away from personnel records

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **An employee calls in sick to work and informs her manager that she has COVID-19. Is this information protected under HIPAA? Should the manager disclose this information to public health authorities and/or co-workers with whom the infected employee came into contact?**
  - The information was voluntarily disclosed to the employer and is not subject to HIPAA because employers are not covered entities subject to HIPAA.
  - General Duty Clause under OSHA most likely applies.
  - Although not required in most states, it is a best practice for the employer to contact its local public health authority and document and follow the authority's advice.
  - If the employer is unable to get in contact with the health authority, the employer should inform any employee who has been in close contact (within 6 feet for 30+ minutes) of the infected individual that they have been in close contact with someone who has tested positive for COVID-19. The employer should ask those employees not to return to work for 14 days.
  - Under the ADA, the name of the infected individual arguably should be treated as a confidential medical record and should not be disclosed to other employees.

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **Employer self-administers its group health plan. An infected employee tells the HR director, responsible for overseeing the group health plan administration, that he has tested positive for COVID-19. Is this information protected under HIPAA?**
  - If the HR director has any doubts as to context in which the information was shared (i.e., the employee was informing the HR director of his illness because the employee had human resource questions about sick leave/disability versus questions about group health plan coverage or continuation), before disclosing the information to a supervisor, the HR director may want to first consult with the group health plan's HIPAA Privacy Officer and/or employee benefits counsel.
  - If the information was shared with the HR director in the HR director's capacity as employer, the information is not protected under HIPAA and the steps outlined in previous FAQ should be followed.

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **Employee notifies his manager that he has been in close contact with someone diagnosed with COVID-19. Is this information protected under HIPAA or could the employer notify the employees' co-workers that one of their colleagues was in contact with someone who has been diagnosed with COVID-19?**
  - The information in the employer's possession is not subject to HIPAA because employers are not covered entities subject to HIPAA
  - The employee should be advised not to come to work for 14 days and to contact his healthcare provider.
  - The CDC "does not recommend testing, symptom monitoring or special management for people exposed to asymptomatic people with potential exposures to SARS-CoV-2 (such as in a household), i.e., 'contacts of contacts'; these people are not considered exposed to SARS-CoV-2." (SARS-CoV2 is the virus that causes COVID-19.)
  - The employer should contact its local public health authority and follow its recommendation.
  - In the absence of that:
    - The most conservative approach would be to inform co-workers that one of their colleagues has been in contact with someone who has the virus.
    - Alternatively, the employer could send out a general COVID-19 notice that reminds people to stay home if sick, wash their hands often, and practice social distancing.

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **Does HIPAA prevent an employer from asking questions about COVID-19 symptoms or screening employee temperatures? Could the employer utilize on-staff medical professionals, or retain medical professionals, to conduct the temperature screenings?**
  - HIPAA does not prevent an employer from asking questions about COVID-19 symptoms and/or conducting temperature screenings because employers are not covered entities under HIPAA.
  - The EEOC has issued guidance which provides that employer inquiries regarding an employee's COVID-19 symptoms and temperature screens (although they constitute medical inquiries and/or medical exams) are permissible under the ADA in times of pandemic, so long as the information is kept confidential.
  - To the extent that the information is recorded, it should be kept in a separate, employee medical file and not in an employee's personnel record.
  - To the extent that a medical professional on staff, or retained by the employer, conducts the inquiries and/or temperature checks as part of workplace surveillance, the inquiries and/or temperature screenings would not be subject to HIPAA privacy restrictions and could be disclosed to the employer.

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **Does the HIPAA Privacy Rule's public health provision permit covered healthcare providers from disclosing COVID-19 diagnosis to an individual's employer?**
  - HIPAA's public health provision permits covered healthcare providers to disclose an individual's COVID-19 diagnosis to the individual's employer without authorization in very limited circumstances.
    - The covered healthcare provider must conduct the COVID-19 testing at the request of the individual's employer or as a member of the employer's workforce.
    - The COVID-19 testing must relate to the medical surveillance of the workplace or an evaluation to determine whether the individual has a work-related illness.
    - The employer must have a duty under OSHA, MSHA or other federal, state or local laws to conduct workplace surveillance of COVID-19 exposure (e.g., testing all or a portion of employees for COVID-19 exposure).
  - Where the COVID-19 testing does not meet the above requirements, a covered entity may not disclose an individual's COVID-19 test results without a HIPAA authorization, unless the disclosure falls within another permitted disclosure category.
  - Once the information is provided to the employer, it is no longer covered under HIPAA; however, under the ADA this information is likely considered disability-related medical information and should be treated as a confidential medical record.

FAQs re: COVID-19 & HIPAA Privacy Concerns

- **An HR director, responsible for administering the employer's self-funded group health plan, reviews a claim for services of a co-worker. The claim coding suggests that the employee was treated for COVID-19. Would HIPAA prevent the HR director from disclosing the information to the employer?**
  - HIPAA does not permit covered entities to disclose protected health information to an individual's employer without written authorization.
  - The potential presence of COVID-19 at an individual's workplace does not in itself provide an exception for the health plan to notify the employer.
  - However, the HR director may communicate concerns about potential workplace spread to public health authorities, on behalf of the group health plan, identifying the employer.

Note: Other confidentiality provisions may apply which are not thoroughly addressed in this webinar, such as the Americans with Disabilities Act, the Family and Medical Leave Act, Workers' Compensation laws, state privacy laws, and the EU General Data Protection Regulation.

COVID-19 & PAYROLL TAX & FRINGE BENEFITS CONSIDERATIONS

Home-Office Expense Reimbursements

As offices are closing, employers are grappling with how to provide the equipment and services that employees need to effectively perform their jobs remotely. Examples include: home internet, remote conferencing video cameras, computer equipment (monitors, docking stations, etc.), and workspace furniture (desks and chairs). What are the payroll tax consequences under existing law of covering home-office expenses?

- The working condition fringe benefit exclusion: IRC 132(a)(3) & (d); Treas. Reg. 1.132-5
- Business expense substantiation standards

Reimbursing Out-of-Pocket Business Expenses for Cancelled Events

Businesses across the globe have had to suspend travel, conferences, and business meetings for the indefinite future. Under existing law, what should employers consider before reimbursing employees for any out-of-pocket expenses attributable to COVID-related business disruptions from a payroll tax perspective?

- The accountable plan rules: Treas. Reg. 1.62-2
- Other common scenarios

IRC 139, Disaster Relief Payments

- Historical application of IRC 139
- Technical/procedural considerations for invoking this IRS emergency authority
- How might IRC 139 come into play for employers wanting to assist employees with COVID-related hardships?
- What's next?

Families First Coronavirus Response Act (FFCRA): Explanation of the Refundable Payroll Tax Credit Provision

- Overview of key provisions in the FFCRA
- IRS Info Release 2020-57 (Mar. 20, 2020)
- Administrative guidance needed and other open issues

COVID-19 & PLAN ADMINISTRATION & FIDUCIARY DUTY CONSIDERATIONS

Investment Information, Plan Loans and Hardship Withdrawals, and Plan Fiduciary Considerations

COVID-19 Considerations for 401(k)s

- **Investments**
  - Plan communications and information resources
  - Investment education
  - Change investment or deferral elections
- **Hardship Withdrawal**
  - Cover medical expenses
  - Prevent foreclosure or eviction
  - Funeral expenses
  - Tuition repayment
- **401(k) Loans**
- **Mid-Year Reduction/Suspension of Safe-Harbor Matching Contributions**

COVID-19 Fiduciary Duty Considerations

- **Discussions with Investment Managers**
  - Business continuity plans
  - Obligations of key personnel
  - Tax reporting
  - Market volatility/Investment guidelines
  - Purchases, redemptions and valuations suspensions
  - Off-shore investment/Changes in regulations or operations
- **Implications for Fiduciary Committees**
  - Follow procedures
  - Remote meetings
- **Investment Lineup**

COVID-19 & EXECUTIVE COMPENSATION CONSIDERATIONS

COVID-19 Executive Compensation Considerations

- **Deferral elections/accelerated distributions**
  - Confirm existing plan and 409A requirements are satisfied
  - Facts and circumstances determination under section 409A
    - "Unforeseeable emergency"
  - Limited to amount necessary to address emergency
  - Recommendation that IRS waive 409A excise tax due to COVID-19, but no response
- **Economic consequences**
  - Conserve corporate cash in connection with executive compensation programs
  - Review severance plans for 409A implications
  - Repricing stock options

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QUESTIONS?

Biography

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With experience gained as a trial lawyer in the Tax Division of the US Department of Justice (DOJ), **Steve** advises clients on tax controversies and litigation matters involving complex tax issues. Before joining Morgan Lewis and working for the DOJ, Steve served as a law clerk to Judge Tucker L. Melancon of the US District Court for the Western District of Louisiana. He holds a Masters in Tax Law (LL.M.) from Georgetown Law School.

Biography

Michelle M. McCarthy
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Michelle is a partner in the employee benefits and executive compensation practice. She advises both multiemployer and single employer clients on a variety of issues, including legal compliance, tax-qualification, drafting and design, healthcare reform, participant communications, plan investments, fiduciary responsibility, prohibited transactions, withdrawal liability, service provider contracts, benefit claims and appeals, and ERISA litigation. Michelle also represents plans and plan sponsors in connection with US Department of Labor and Internal Revenue Service audits.

Biography

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Mims advises on complex executive compensation and employee benefit plan matters, including the design, negotiation, and implementation of executive compensation, equity compensation, and tax–qualified retirement plans and shareholder approval of equity plans. She counsels large publicly and privately owned businesses, including Fortune 500 enterprises, technology companies, and universities on a range of legal issues related to executive compensation governance, and employee benefit plans. Mims also represents executives in the negotiation of employment agreements and equity compensation, including in connection with transactions. She advises on benefits and executive compensation issues that arise during major corporate transactions, including mergers and acquisitions, sales, IPOs, and spinoffs.

Biography

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

Biography

Saghi Fattahian
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Sage counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

Biography

Sharon Perley Masling
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Sharon, a director of Workplace Culture Consulting at Morgan Lewis, helps companies and organizations create safe, respectful, and inclusive workplaces, focusing on preventing and responding to issues of workplace harassment and misconduct. Having served for eight years as chief of staff and senior counsel to Commissioner Chai Feldblum at the Equal Employment Opportunity Commission (EEOC), Sharon provides insight on the enforcement of all employment civil rights laws and advises employers on issues of employment discrimination.

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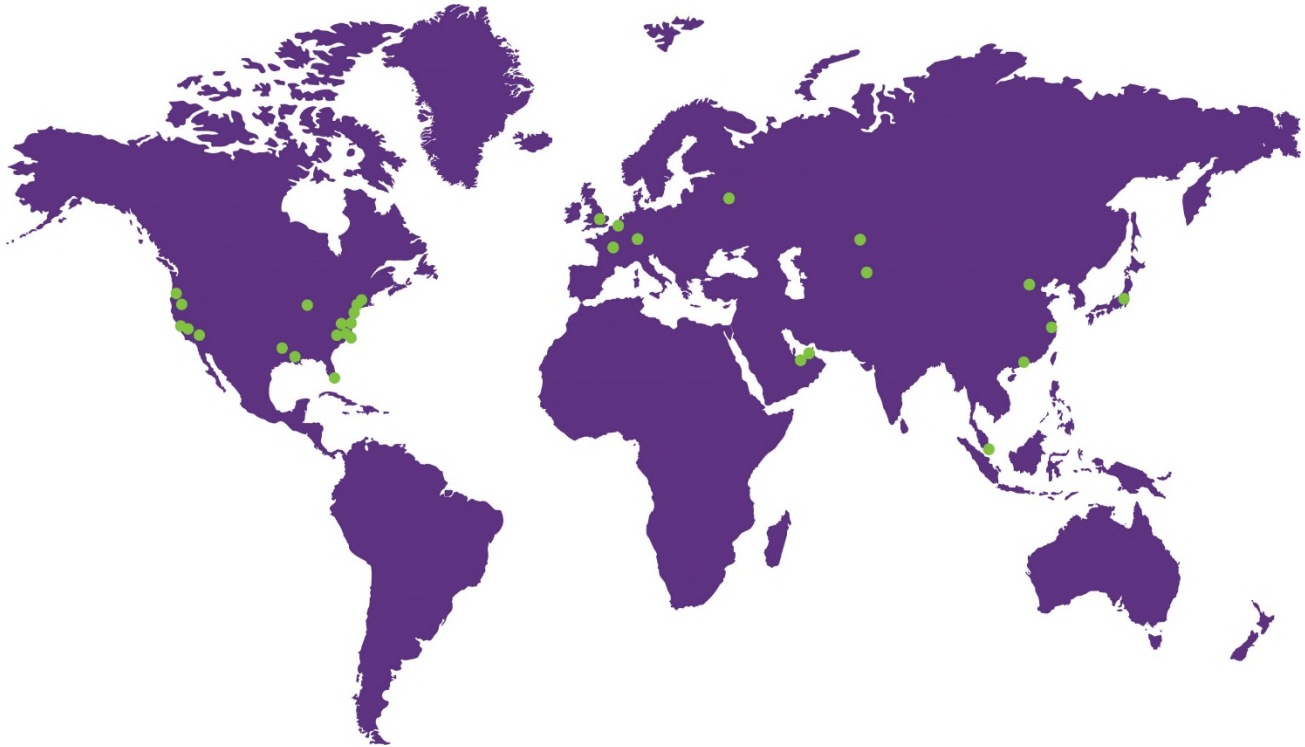

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