

# EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844*

## RE-OPENING OHIO and PPP LOAN FORGIVENESS

Presented by  
Eastman & Smith Ltd.  
June 10, 2020

*Disclaimer: This information has been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.*

# EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844*

Ohio's Reopening Business Protocols – Presented by Kaitlin L. Hoop  
Department of Health Issues – Presented by Lauren M. DeGoricia  
Employment Law Considerations – Presented by Lynn V. Luther  
Re-Opening For Non-Emergent Care – Presented by Breanne M. Rubin  
Litigation Due To The Pandemic – Presented by Jared J. Lefevre  
Ohio's Immunity Legislation – Presented by Stephen A. Roepke  
PPP Loan Forgiveness – Presented by Patrick A. Sadowski  
  
Moderator – Graham A. Bluhm

EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*

# OHIO'S REOPENING BUSINESS PROTOCOLS

Kaitlin L. Hoop

Eastman & Smith Ltd.

(419) 247-1479

[klhoop@eastmansmith.com](mailto:klhoop@eastmansmith.com)

\*me in 10 years\*

cashier: sir your bill is \$20.20

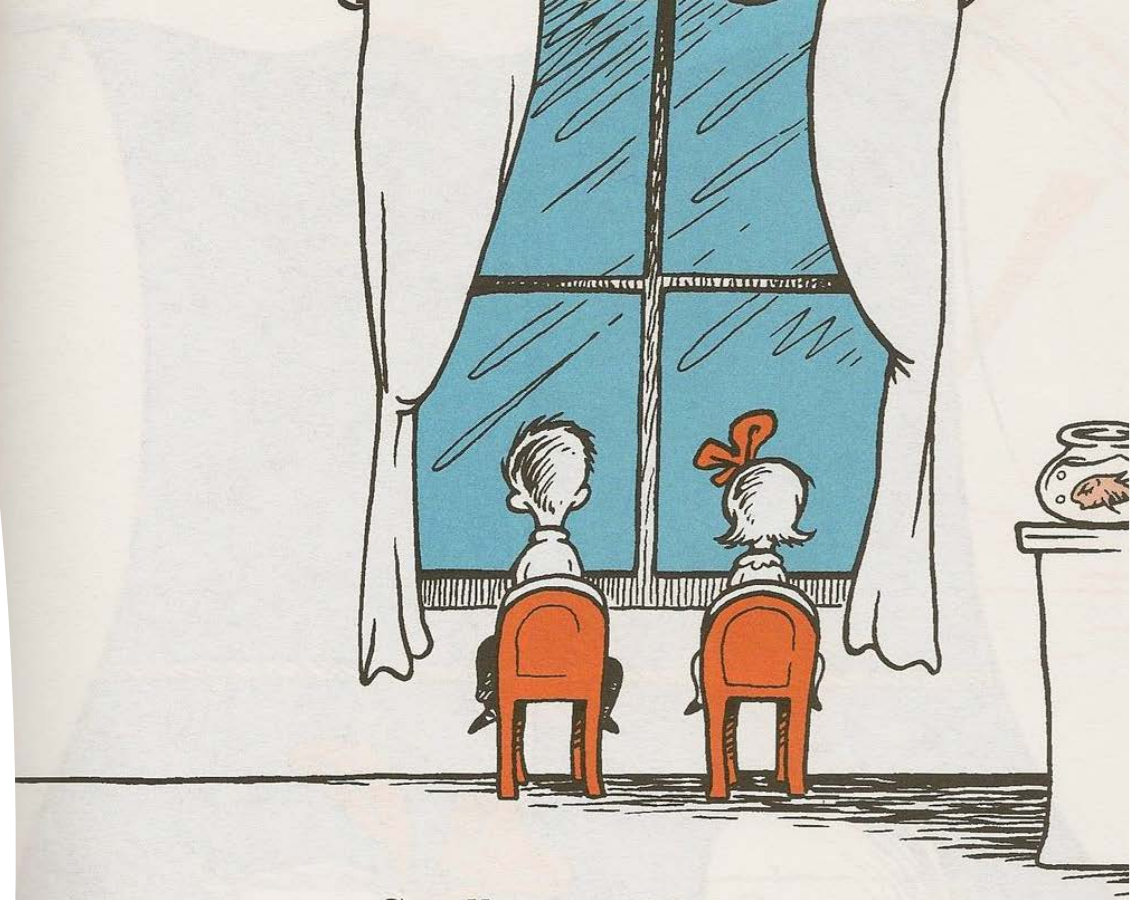
me:



# Continued Closures...

***The following businesses and operations remain closed as of June 10, 2020, as part of Ohio's plan to prevent the spread of COVID-19.***

- K-12 schools. (Excludes activities related to non-contact and limited contact sports; skills training for all sports; pools and aquatic centers.)
- Older adult day care services and senior centers.
- Adult day support or vocational habilitation services in congregate settings.
- Rooming and boarding houses, and workers' camps.



So all we could do was to  
Sit!

Sit!

Sit!

Sit!

And we did not like it.

Not one little bit.



# We see the light! Ohio is Reopening!



|  |                             |  |
|--|-----------------------------|--|
| <b>Responsible RestartOhio</b>   | <b>MAY 12</b>               | Consumer, Retail, and Services         |
| <b>Upcoming Sector Openings</b>  | <b>MAY 15</b>               | Outdoor Dining, Personal Care Services |
| <b>#RESPONSIBLE RESTART Ohio</b><br><b>#IN THIS TOGETHER Ohio</b>  | <b>MAY 21</b>               | Dine-In Service                        |
|  <b>MIKE DEWINE</b><br>GOVERNOR OF OHIO | <b>coronavirus.ohio.gov</b> |  |
|  <b>Ohio</b>   Department of Health     |                             |  |

See the most up-to-date and complete list of protocols here:

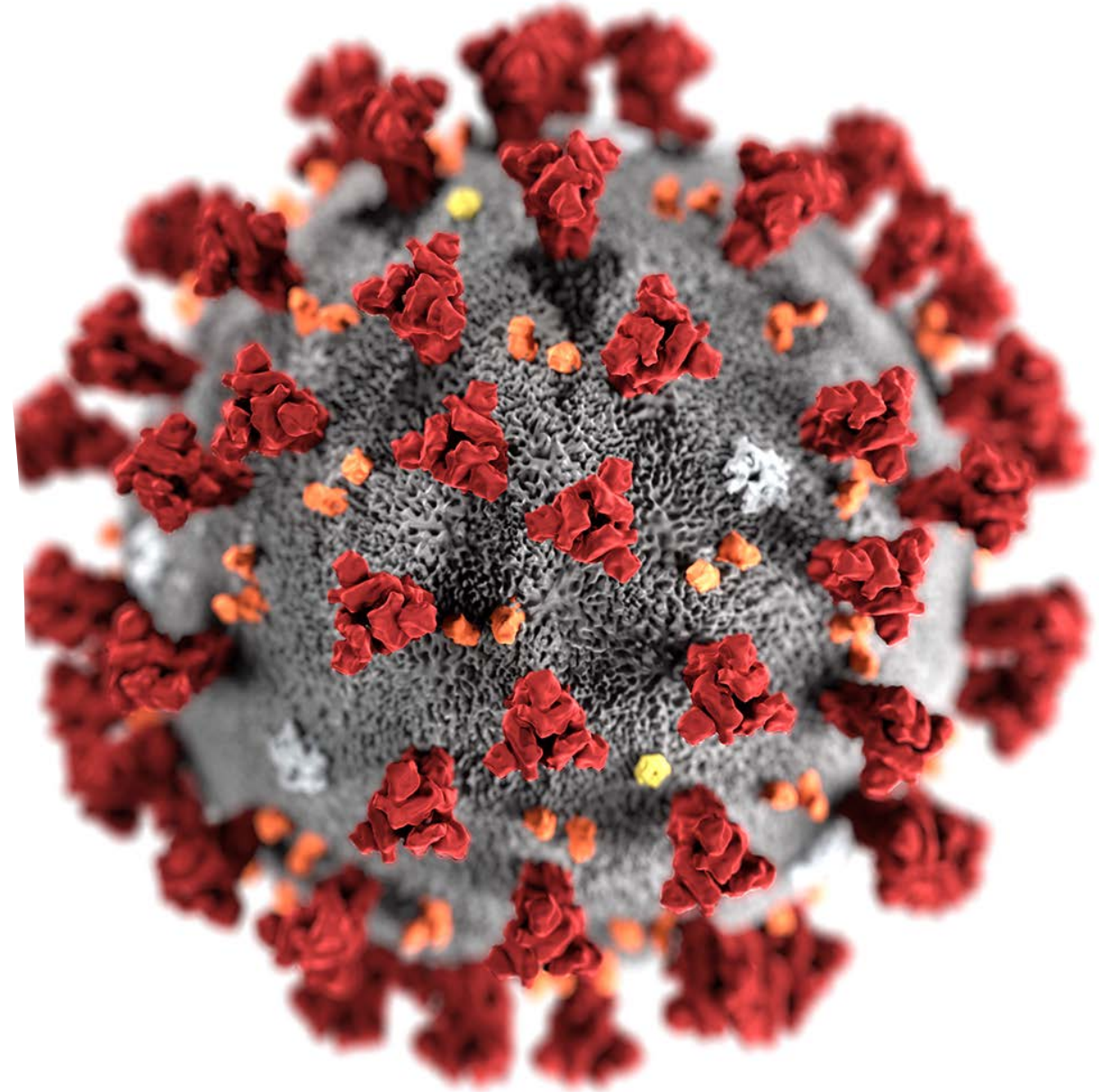
<https://coronavirus.ohio.gov/wps/portal/gov/covid-19/responsible-restart-ohio/>

# RESPONSIBLE PROTOCOLS FOR ALL BUSINESSES

1. **Require face coverings** for employees and recommend them for clients/customers at all times.
2. **Conduct daily health assessments** by employers and employees (self-evaluation) to determine if “fit for duty.”
3. **Maintain good hygiene** at all times – hand washing, sanitizing and social distancing.
4. **Clean and sanitize** workplaces throughout workday and at the close of business or between shifts.
5. **Limit capacity** to meet **social distancing** guidelines.
  - Establish maximum capacity; and
  - Use appointment setting where possible to limit congestion.

# TAKE THE FOLLOWING ACTIONS WHEN A COVID-19 INFECTION IS IDENTIFIED:

- **Immediately report** employee or customer infections to the local health district.
- Work with local health department to identify potentially exposed individuals to help facilitate appropriate communication/**contact tracing**.
- **Shutdown** shop/floor for deep sanitation if possible.
- Professionally clean and sanitize site/location.
- Reopen in consultation with the local health department.





# SECTOR-SPECIFIC OPERATION PROTOCOLS - the “Primary Sectors”



- Assisted living facilities
- Casinos and Racinos
- Child Care
- Consumer Retail Services and Entertainment\*
- County Fairs
- Deputy Registrar
- Driver Examination Services
- General Office\*
- Gyms, Dance, Personal Fitness
- Local Pools and Aquatic centers
- Manufacturing, Distribution, and Construction\*
- Residential Camps
- Restaurants Bars Banquet Facilities\*

## MANDATORY PROTOCOLS FOR CONSUMER, RETAIL, SERVICES, AND ENTERTAINMENT

- 6 feet between people or install barriers
- Face coverings are required for employers and employees
- Daily symptom assessment
- Regular handwashing
- Place hand sanitizers in high-contact locations
- Clean high-touch items after each use
- Specify hours for **at-risk populations**
- Ask customers and guests not to enter if symptomatic
- Post **social distancing signage** and disinfect high-contact surfaces hourly
- Clean merchandise before stocking if possible
- Establish maximum capacity
- **Discontinue self-service and food samples**
- Food courts must **follow Restaurants, Bars, and Banquet & Catering Facilities/Services Guidance**
- Entertainment businesses with food service operations must also **follow Restaurants, Bars, and Banquet & Catering Facilities/Services Guidance Stagger Entry of Customers and Guests**
- Entertainment businesses that **offer sports activities and sports leagues must follow guidance for General Non-Contact Sports**





# Certain Entertainment now OPEN!

“The following entertainment businesses are currently permitted to operate as long as they follow the Consumer, Retail, Services & Entertainment guidance and any other applicable associated guidance that is specific to their business on **June 10th, 2020**: Aquariums, art galleries, batting cages, bowling alleys, country clubs, ice skating rinks, indoor family entertainment centers, indoor sports facilities, laser tag facilities, miniature golf, movie theaters (indoor), museums, playgrounds (outdoor), public recreation centers, roller skating rinks, social clubs, trampoline parks, and zoos.”

Coming June 19: Movie Theaters, Water Parks, Amusement Parks.





## MANDATORY PROTOCOLS FOR GENERAL OFFICE ENVIRONMENTS

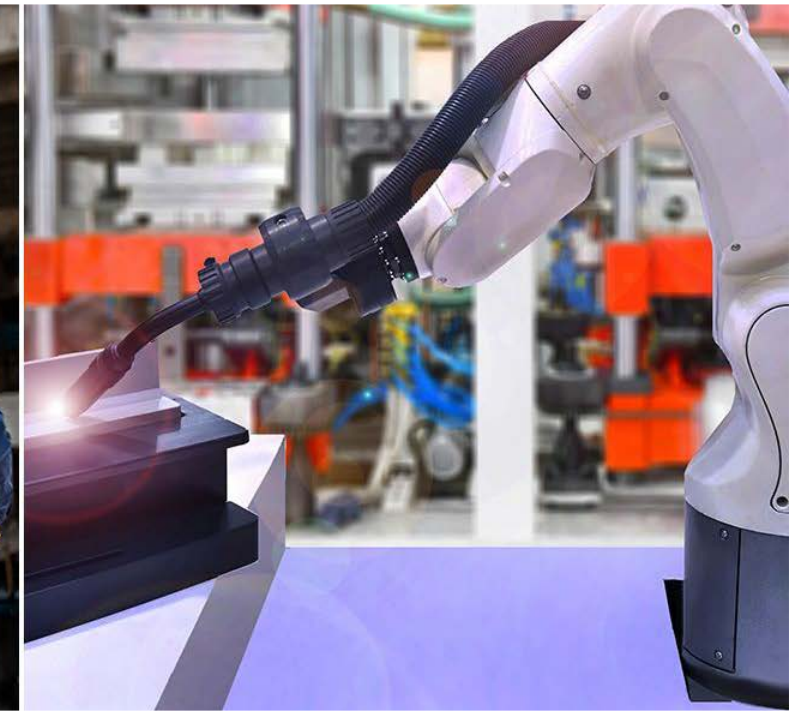
- Ensure minimum **6 feet** between people or install barriers (for employees and guests)
- **Work from home whenever possible**
- Face coverings are required for employers and employees
- **Daily symptom assessment**
- Require regular **handwashing**
- Place hand sanitizers in **high-contact locations**
- Clean **high-touch items** after each use
- **Frequent disinfection** of desks, workstations and high-contact surfaces
- **Daily disinfection of common areas**
- **Cancel/postpone in person events** where social distancing cannot be maintained
- **No buffet** in cafeteria
- **Reduce sharing** of work materials
- Utilize **disposable tableware** and other materials
- Establish **maximum capacity**
- **Post signage** and health guidelines in common areas





## MANDATORY PROTOCOLS FOR MANUFACTURING, DISTRIBUTION, & CONSTRUCTION

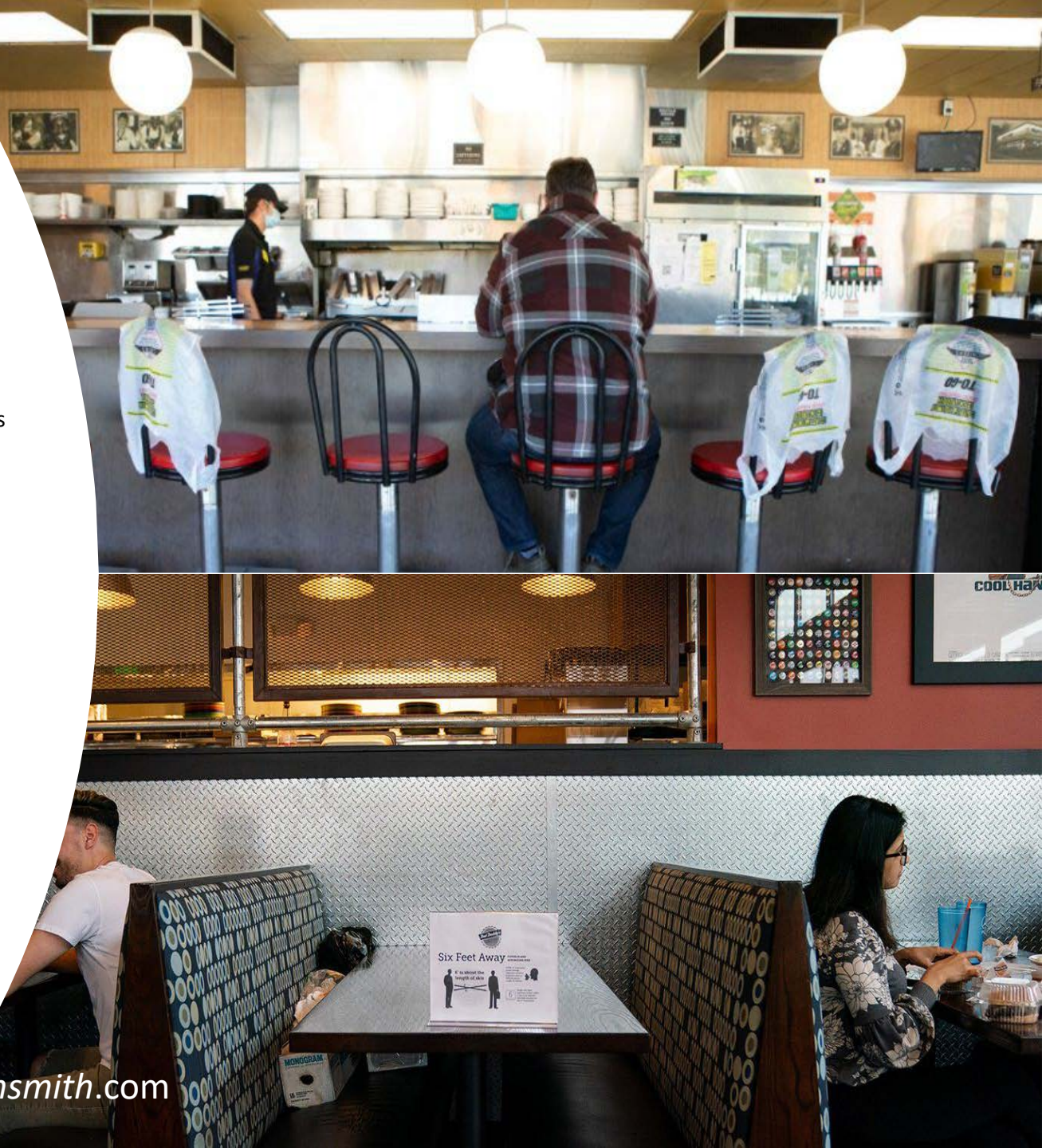
- Ensure minimum 6 ft between people, if not possible, install barriers
- All **employees to wear facial coverings** unless in a solo workspace, illegal, unsafe, or impractical
- Employees must perform **daily symptom assessment**
- Require employees to **stay home if symptomatic**
- Require regular **handwashing**
- **Stagger or limit arrivals** of employees and guests
- Stagger Lunch breaks
- Regulate **common area congregation (groups of 10 or less)**
- **Disinfect workstations daily**



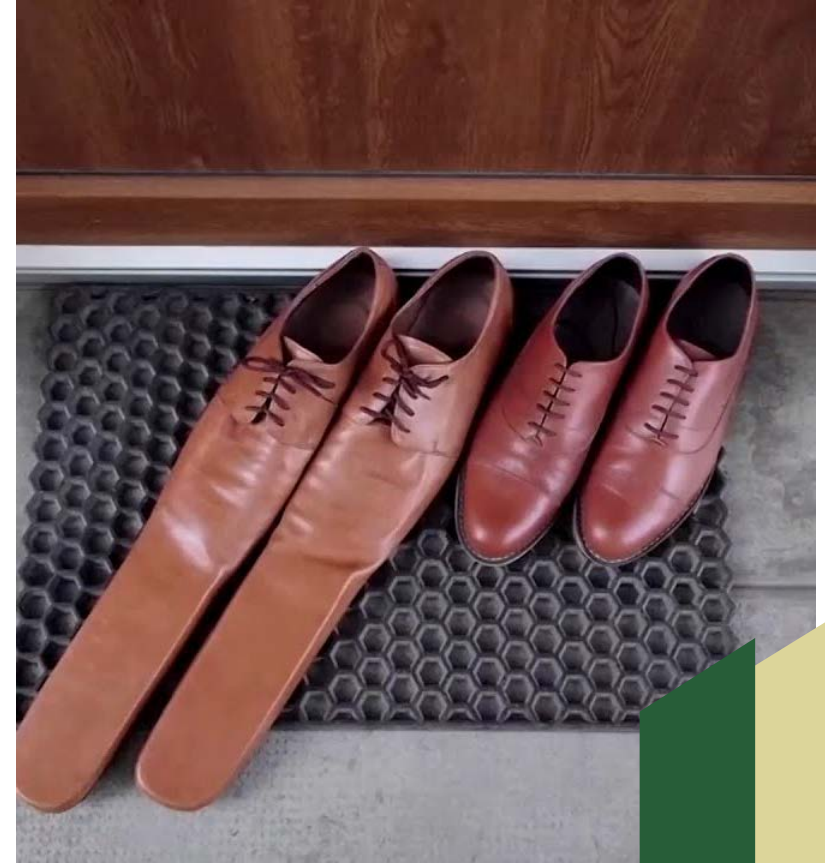


# MANDATORY PROTOCOLS FOR RESTAURANTS, BARS, BANQUET/CATERING FACILITIES & SERVICES

- Ensure minimum **6 feet** between people or install barriers (for employees, customers and guests and physical spaces)
- **Face coverings** are required for employers and employees
- **Daily symptom assessment by employees; stay home if symptomatic**
- Provide **ServSafe education** or other approved COVID-19 education ASAP
- **Regular handwashing**
- **Limit number** of employees allowed in break rooms; groups of 10 max
- Post a list of **COVID-19 symptoms in a conspicuous place for customers and employees**
- Ask customers and guests **not to enter if symptomatic**
- Provide customer and employee access to hand washing stations and place hand sanitizers in **high-contact locations**
- **Establish maximum capacity to comply with social distancing**
- Post a **kitchen floor plan**
- **Daily cleaning for the entire establishment**
- Clean and sanitize tabletops, chairs, and menus between customers and clean high touch areas every **two hours**
- Establishing **ordering and waiting areas**
- **Remove** self-service, table, and common area items
- **Specify hours for at-risk populations**
- Comply with **person in charge certification requirements and manager certification requirements** as set forth in OAC 3701-21-25 and OAC 3717-1-02.4 as applicable
- Maintain compliance with **ODH sanitation and food safety regulations**
- Banquet and catering facilities/services **must not serve more than 300 guests** at one time
- Salad bars and buffets are **permitted if served by staff with safe six feet social distancing between parties**
- **Self-service buffets and product samples are prohibited, but self-service beverage is permitted.**
- **Private dining** and bar seating areas within a foodservice establishment **must follow all approved safe social distancing guidelines**
- The open congregate areas not necessary for the preparation and service of food or beverages (**billiards, card playing, pinball games, video games, arcade games, dancing, entertainment**) shall remain closed.







Entrepreneurs – Get Creative!

**Kaitlin L. Hoop, Esq.**

Eastman & Smith Ltd.

(419) 247-1479

[klhoop@eastmansmith.com](mailto:klhoop@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# DEPARTMENT OF HEALTH ISSUES

Resources, Enforcement, & Challenges

Lauren M. DeGoricia, Esq.

Eastman & Smith Ltd.

(614) 564-1459

[lmdegوريا@eastmansmith.com](mailto:lmdegوريا@eastmansmith.com)

# Authority

- Tenth Amendment to the United States Constitution
  - Whatever powers that are not granted to the federal government by this Constitution are hereby reserved to the individual states.
  - Police powers
- The power to protect and promote the health, safety, peace and general welfare of the people.
  - Inherent power of a sovereign government
  - Laws passed by virtue of the **police power** will be upheld if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable. *City of Cincinnati v. Correll*, 141 Ohio St. 535 (1943).



# Authority continued...

- Enabling legislation
  - Creates an Administrative Agency
  - Grants Powers and Duties
  - Ohio Revised Code Chapter 3709 - Hughes-Griswold Act of 1919
    - State divided into health districts.
    - Each city shall constitute ... a **city health district**.
    - The townships and villages in each county shall be combined into a health district and ... shall be known as ... a **general health district**.
- Ohio Attorney General Opinion 2010-019 – “Protection and preservation of public health are among the prime governmental concerns and functions of the state as a sovereignty ... Under the powers reserved to it by the Constitution, the state, acting through the General Assembly, may enact general laws to that end.” *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1 (1940). “In accordance with this reserved power, the General Assembly first enacted the Hughes Act and later, in amended form, the Griswold Act, ... by the terms of which the state was divided into health districts.” *Mowrer*, at 4. *See also State ex rel. Cuyahoga Heights v. Zangerle*, 103 Ohio St. 56 (1921).

# Authority continued...

## **3701.13 Department of health - powers.**

“The department of health shall have supervision of all matters relating to the preservation of the life and health of the people and have ultimate authority in matters of quarantine and isolation ...”

“The department may make special or standing orders or rules ... for preventing the spread of contagious or infectious diseases ...”

# Enforcement

- **Enforcement** - This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. Specifically, pursuant to R.C 3701.352 “[n]o person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.” R.C. 3701.56 provides that “[b]oards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce quarantine and isolation orders, and the rules the department of health adopts.”
- **Criminal Penalty** - A violation of R.C. 3701.352 is guilty of a **misdemeanor of the second degree**, which can include a fine of not more than \$750 or not more than 90 days in jail, or both.
- **Civil Remedies** - Injunctive relief (TRO, preliminary and permanent injunction); example, Cuyahoga County BOH v. Second City Ltd.

# Enforcement continued...

## Ohio Attorney General

- Investigating complaints for businesses with state-wide operations; referring local businesses to local health districts

## Franklin County Public Health

- Received 1,270 complaints
- Issued 6 Cease and Desist Orders

## Columbus Public Health

- Received 5,676 complaints
- Issued 2 Cease and Desist Orders
- Issued 77 Warning Letters

- Education first approach; enforcement as a last resort

# Challenges

Hartman, et al. v. Acton (Federal Court - U.S. District Court of Southern Ohio)

- Lawsuit claiming April 2, 2020 Director's Amended Stay at Home Order, specifically the cessation of non-essential business (bridal boutique), is overly vague, provides no hearing, and is the result of an impermissible delegation of authority to ODH; and therefore constitutes a violation of due process rights; TRO, preliminary and permanent injunctive relief sought
- TRO denied
- Amended Stay at Home Order expired; Amended complaint still addresses expired Order; seeks damages
- Pending motion to dismiss for lack of jurisdiction and failure to state a claim
  - 11<sup>th</sup> Amendment bars claims for monetary damages against State, lacks standing for other businesses, moot, no jurisdiction to hear delegation claim, no hearing required because Order has general application, etc.



# Challenges continued...

Rock House Fitness, Inc., et al. v. Acton, et al. (Ohio State Court – Lake County Court of Common Pleas)

- 35 fitness gyms brought a lawsuit against Ohio Department of Health Director, Dr. Amy Acton
- May 20, 2020 – Court granted preliminary injunction preventing Dr. Acton from imposing or enforcing penalties for non-compliance with Paragraph 13(g)
- May 22, 2020 – Dr. Acton issues Order the Reopens Gyms, Dance Instruction Studios, and Other Personal Fitness Venues, with Exceptions
  - Extensive sector specific requirements

# Challenges continued...

- Accordingly, Defendant Amy Acton, in her official capacity as the Director of the Ohio Department of Health, and the Lake County General Health District, together with their officers, agents, servants, employees, attorneys, and those persons or entities acting at their direction or behest, or in active concert or participation with them, and who receive actual notice of this order, whether by personal service or otherwise, including, without limitation, law enforcement officers, prosecuting attorneys, and the attorney general, are hereby ENJOINED from imposing or enforcing penalties solely for non-compliance with the director's order against the following businesses listed in Paragraph 13(g) of the order: "gymnasiums," "health clubs," "fitness centers," "gyms," and "workout facilities," so long as they operate in compliance with all applicable safety regulations, whether those in the state's order, the state's supplemental guidelines governing businesses like those of the plaintiffs in this case, or the Lake County General Health District.

# Resources

**11. Social Distancing Requirements.** For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

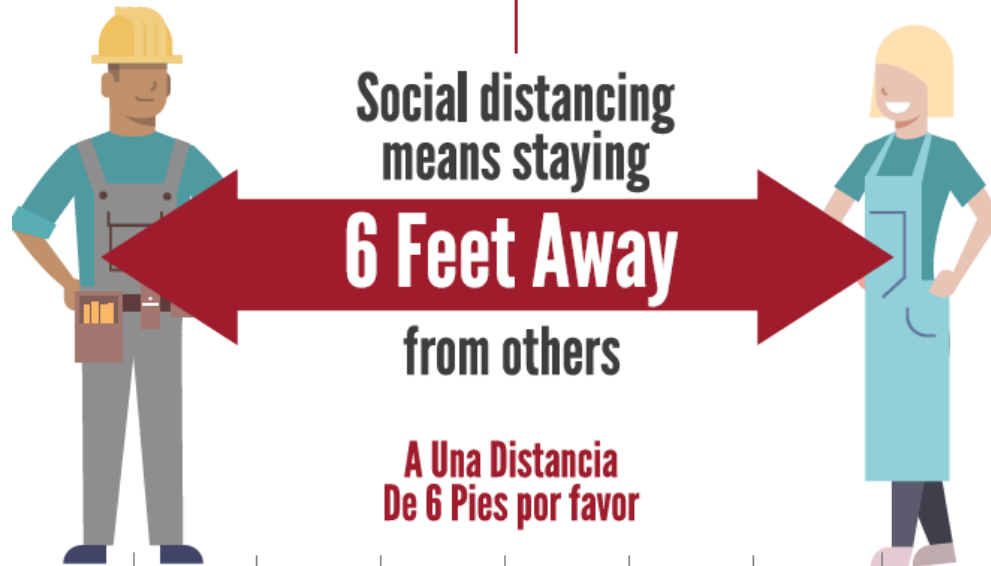
**a. Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:

**i. Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;

- “Post social distancing signage” required for sector specific

**Please keep your social distance.**

Distanciamiento Social | Mantenga Su Distancia



For more information go to  
**covid-19.myfcph.org**



## GENERAL WORKPLACE HEALTH AND SAFETY TIPS

# COVID-19

(CORONAVIRUS)



### Tips for the Workplace

- Take temperature daily
- Encourage staff to stay home when sick.
- Consider a flexible leave benefit to allow employees to take time to be home when sick, take care of someone who is ill, or who is concerned about becoming sick.
- Evaluate teleworking policies; determine who must be in office and who can do their job from home.
- Clean and disinfect high traffic areas including doorknobs, light switches, etc.

### If an employee comes into work sick

- Have them leave work immediately.
- Encourage them to follow up with their doctor or healthcare provider for further guidance and assessment (see Steps to Take If You Are Sick).

### If an employee is tested for COVID-19

- The employer will not be notified by a health-care provider or public health staff member if one of their employees is tested for COVID 19.
- The healthcare provider will instruct the employee to self-isolate at home until the test results come back.

Franklin County  
Public Health  
[www.myfcph.org](http://www.myfcph.org)



### Testing Procedures for COVID-19

#### – If the test comes back negative for COVID-19

- The employee can resume normal daily activities without restriction of movement assuming they are not still exhibiting symptoms.
- Encourage the employee to remain home while sick. Rule of thumb for fever is fever-free for a minimum of 72 hours without taking fever-reducing medications (e.g., Tylenol, Advil).

#### + If the test comes back positive for COVID-19

- A public health official will contact the employee to provide further guidance on restrictions. The employee is not to leave the house without the authorization of a public health official.
- A public health official will ask the employee for a list of close contacts since the onset of the illness.
  - The information needed will include people they were in contact with as well as any public places they visited.
- Once the contact information is obtained, public health officials will begin notifying these individuals, and if necessary, locations of possible exposure.
  - Employers will be notified by public health if one of their employees test positive.
- All close contacts will be required to self quarantine, stay home and avoid public places for 14 days under the guidance of a public health official.
- Public health officials will work with the employee to determine when they can leave their home and resume normal daily activities without restriction.

LEARN MORE: [www.covid-19.myfcph.org](http://www.covid-19.myfcph.org)

# Stop the spread of germs.



**Wash your hands** often with soap and water for at least 20 seconds.



**Cover your cough or sneeze** with your arm or inner elbow, NOT your hands.



**Avoid close contact** with people who are sick.



**Stay home when you are sick,** except to get medical care.



**Avoid touching** your eyes, nose and mouth.



**Clean and disinfect** frequently touched objects and surfaces.

THE CITY OF  
**COLUMBUS**  
ANDREW J. BRYAN, MAYOR  
COLUMBUS  
PUBLIC HEALTH

Franklin County  
Public Health

[www.publichealth.columbus.gov](http://www.publichealth.columbus.gov)  
[www.myfcph.org](http://www.myfcph.org)



**Lauren M. DeGoricia, Esq.**

Eastman & Smith Ltd.

(614) 564-1459

[lmdegوريا@eastmansmith.com](mailto:lmdegوريا@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844* | Innovating Daily

# EMPLOYMENT LAW CONSIDERATIONS

Lynn V. Luther, Esq.

Eastman & Smith Ltd.

(419) 247-1746

[lvluther@eastmansmith.com](mailto:lvluther@eastmansmith.com)



# EEOC

- ADA – Accommodations for COVID-19 and Related Issues
- Discrimination – Layoff and Returning Employees to Work
- Retaliation
- Workforce Training/Education

# Wage & Hour

- Families First Coronavirus Response Act (FFCRA)
  - Paid Sick Leave and Paid Expanded Family and Medical Leave
  - December 31, 2020

## Exempt Status

- Watch for employee misclassifications as people return to work!

## CARES Act

- Federal Unemployment Supplement expires July 31, 2020







**Occupational Safety and  
Health Administration**

# What OSHA Regulations Apply?

---

General Duty Clause

---

PPE

---

Bloodborne pathogens

---

Sanitation

---

Hazard Communication

---

Recordkeeping

---

Whistleblower protections

---

MI Executive Order 2020-97 “Safeguards to Protect Michigan’s  
Workers from COVID-19”

| Type of Violation                                     | Maximum Penalty (per citation) |
|---|--------------------------------|
| Serious<br>Other-Than-Serious<br>Posting Requirements | \$13,494 per violation         |
| Willful or Repeated                                   | \$134,937 per violation        |

## 2020 OSHA Penalties

# OSHA Guidance

- General Guidance for all Workplaces
- Manufacturing
- Construction
- Healthcare
- Dentistry
- Emergency response and public safety
- Postmortem care
- Meat and poultry processing  
(developed in partnership with CDC)
- Laboratories
- Airline operations
- Retail operations
- Border protection and transportation security
- Correctional facility operations
- Solid waste and wastewater management
- Environmental (i.e., janitorial) services
- In-home repair services
- Business travelers
- Travel to areas where the virus is spreading

<https://www.osha.gov/SLTC/covid-19/controlprevention.html>

# Private Lawsuits Filed by Employees



**Lynn V. Luther, Esq.**  
Eastman & Smith Ltd.  
(419) 247-1746  
[lvluther@eastmansmith.com](mailto:lvluther@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*





EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# RE-OPENING FOR NON-EMERGENT CARE

CMS, CDC, AMA, and ODH Guidance and Protocols for Safely  
Resuming Non-Emergent Health Care Services

Breanne M. Rubin, Esq.

Eastman & Smith Ltd.

(419) 247-1754

[bmrubin@eastmansmith.com](mailto:bmrubin@eastmansmith.com)

# POLICY CHANGES

**March 18, 2020**

Centers for Medicare & Medicaid Services (CMS) recommended that all elective surgeries, non-essential medical, surgical, and dental procedures be delayed during the 2019 Novel Coronavirus (COVID-19) outbreak.

**April 7, 2020**

CMS updated its Guidance with a three-tiered framework, regarding limiting non-emergent, non-essential care for patients of all ages, emphasizing the importance of reducing exposure of patients and staff to the virus and the importance of reducing burdens on the existing health system.

**April 19, 2020**

CMS provides recommendations on re-opening to provide non-emergent non-COVID-19 Healthcare specifically targeted to communities that are in Phase 1 of the Guidelines for Opening Up America Again with low incidence or relatively low and stable incidence of COVID-19 cases.

Source: Centers for Medicare & Medicaid Services, "CMS Releases Recommendations on Adult Elective Surgeries, Non-Essential Medical, Surgical, and Dental Procedures During COVID-19 Response." (March 18, 2020); Centers for Medicare & Medicaid Services, "Non-Emergent, Elective Medical Services, and Treatment Recommendations." (April 7, 2020); CMS, Press Release, "CMS Issues Recommendations to Re-Open Health Care Systems in Areas with Low Incidence of COVID-19" (April 19, 2020).

# GATING CRITERIA

## CDC / OPENING AMERICA UP AGAIN



In order to enter Phase 1, states or regions must meet gating criteria related to cases, symptoms, and hospitals.

- **Symptoms**

- Downward trajectory of COVID-like syndromic cases reported within a 14-day period, AND
- Downward trajectory of influenza-like illnesses (ILI) reported within a 14-day period.

- **Cases**

- Downward trajectory of documented COVID-19 cases within a 14-day period, OR
- Downward trajectory of positive tests as a percent of total tests within a 14-day period.

- **Hospitals**

- Ability to treat all patients without crisis care (capacity indicators include the % of inpatient and ICU beds occupied, PPE supplies, and proper staffing), AND
- Robust testing program in place for at-risk healthcare workers, including emerging antibody testing.

Source: Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Response, "CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again." (May 2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>; Guidelines, Opening Up America Again available at <https://www.whitehouse.gov/openingamerica/>.

# **CMS APRIL 19, 2020 GUIDANCE**

## **RECOMMENDATIONS ON RE-OPENING HEALTHCARE:**

### **PHASE I**

- Health care facilities and providers in areas that have met the gating criteria may provide essential, non-emergent, non-COVID-19 related care.
- Continued use of telehealth modalities is strongly encouraged.
- For in-person, non-COVID-19 care, providers should consider plans for the following:
  - The availability of adequate facilities, workforce, testing, and supplies
  - The availability of adequate workforce across phases of care (such as availability of clinicians, nurses, anesthesia, pharmacy, imaging, pathology support, and post-acute care)
- Facilities should continually evaluate:
  - Whether their state or locality has the resources to provide non-COVID-19 care, and
  - Their ability to quickly respond to a surge in COVID-19 cases, if necessary.





## **CMS APRIL 19, 2020 GUIDANCE RECOMMENDATIONS ON RE-OPENING HEALTHCARE: PHASE I**

- General considerations:
  - In coordination with state and local public health officials, evaluate the incidence and trends for COVID-19 in the area where re-starting in-person care is being considered.
  - Evaluate the necessity of the care based on clinical needs and prioritize surgical/procedural care, high-complexity chronic disease management, and select preventive services.
  - Consider establishing Non-COVID Care (NCC) zones that would screen all patients for symptoms of COVID-19, including temperature checks, and routinely screening staff.
  - Sufficient resources should be available to the facility across phases of care, including PPE, healthy workforce, facilities, supplies, testing capacity and post-acute care, without jeopardizing surge capacity.



# AMA PHYSICIAN PRACTICE GUIDE TO REOPENING

- Comply with governmental guidance
  - Federal: CDC, CMS, and Opening Up America Again
  - State and city health department guidance
- Make a plan
  - Reopen incrementally if possible
  - Assess PPE needs
  - Make plans for staffing, cleaning, and handling a COVID-19 case
- Institute safety measures for patients, clinicians, and staff
  - Screen patients and employees for symptoms
- Implement a tele-triage program
  - Direct patients with non-emergent needs to the practice's telemedicine platform



# AMA PHYSICIAN PRACTICE GUIDE TO REOPENING



- Contact your medical malpractice insurance carrier
  - Ensure that your clinicians are adequately protected from liability.
- Establish confidentiality, privacy, and data security protocols
  - Coworkers and patients can be informed that they came into contact with an employee who tested positive for COVID-19, but the identity of the employee and details about an employee's symptoms cannot be shared with patients or co-workers without consent.
  - While certain HIPAA requirements related to telemedicine are not being enforced during the COVID-19 public health emergency, generally, HIPAA privacy, security and breach notification requirements must continue to be followed.
- Consider legal implications
  - Paid sick leave (per the Families First Coronavirus Response Act)
  - Local health department requirements for reporting COVID-19 cases

# OHIO GUIDANCE

- Ohio Department of Health Director's Order (June 2, 2020) permits all non-essential surgeries and procedures may resume, but requires that providers:
  - adhere to infection control guidelines
  - maintain adequate inventories of PPE, supplies, equipment, and medicine
  - define processes for timely COVID-19 testing of patients and staff
  - evaluate access to supply chain
  - use telehealth whenever possible
  - develop an action plan for communication, outreach and equitable delivery of services that recognizes social determinants of health and engages patients in discussion of COVID-19 contraction risks and shared decision-making regarding the need of and timing of health care services
- follow the [Responsible Restart Ohio Guide for Health Care](https://coronavirus.ohio.gov/static/responsible/RestartOhio-Health-Care-Guide.pdf)



Source: Director's Order that Amends the Requirements for Non-Essential Surgeries and Procedures, Ohio Department of Health (Jun. 2, 2020) available at <https://coronavirus.ohio.gov/static/publicorders/Non-Essential-Surgeries.pdf>; Responsible RestartOhio – A Guide for Health Care, Ohio Department of Health, available at <https://coronavirus.ohio.gov/static/responsible/RestartOhio-Health-Care-Guide.pdf>.

# Responsible Restart Ohio Guide for Health Care (ODH)



*Step 1: Conduct Reassessment of Delayed Surgeries and Procedures*

*Step 2: Restart All Medically Necessary Procedures That Do Not Require an Overnight Stay or an Inpatient Admission*

*Step 3: Restart Remaining Non-Urgent Inpatient Hospital and Other Services*

Source: Director's Order that Amends the Requirements for Non-Essential Surgeries and Procedures, Ohio Department of Health (Jun. 2, 2020) available at <https://coronavirus.ohio.gov/static/publicorders/Non-Essential-Surgeries.pdf>; Responsible RestartOhio – A Guide for Health Care, Ohio Department of Health, available at <https://coronavirus.ohio.gov/static/responsible/RestartOhio-Health-Care-Guide.pdf>.



| Type of Service                                    |   | Step 1<br>Through April 30, 2020 | Step 2<br>Beginning May 1, 2020 | Step 3<br>Date TBD |
|--|---|----------------------------------|---------------------------------|--------------------|
| Essential  | Surgeries and procedures  | ✓                                | ✓                               | ✓                  |
|  | Office-based health care services   | ✓                                | ✓                               | ✓                  |
| Medically<br>Necessary<br>Non-Urgent<br>Outpatient | Office-based health care services   |                                  | ✓                               | ✓                  |
|  | Outpatient surgeries, procedures  |                                  | ✓                               | ✓                  |
|  | Outpatient diagnostic tests   |                                  | ✓                               | ✓                  |
|  | Outpatient imaging tests  |                                  | ✓                               | ✓                  |
| All Non-Urgent<br>Inpatient & Other<br>Services    | All other inpatient surgeries & health care services that may be necessary or beneficial to the patient, but are not time-sensitive |                                  |                                 | ✓                  |

Responsible RestartOhio – A Guide for Health Care, Ohio Department of Health, available at <https://coronavirus.ohio.gov/static/responsible/RestartOhio-Health-Care-Guide.pdf>.

**Breanne M. Rubin, Esq.**  
Eastman & Smith Ltd.  
(419) 247-1754  
[bmrubin@eastmansmith.com](mailto:bmrubin@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*

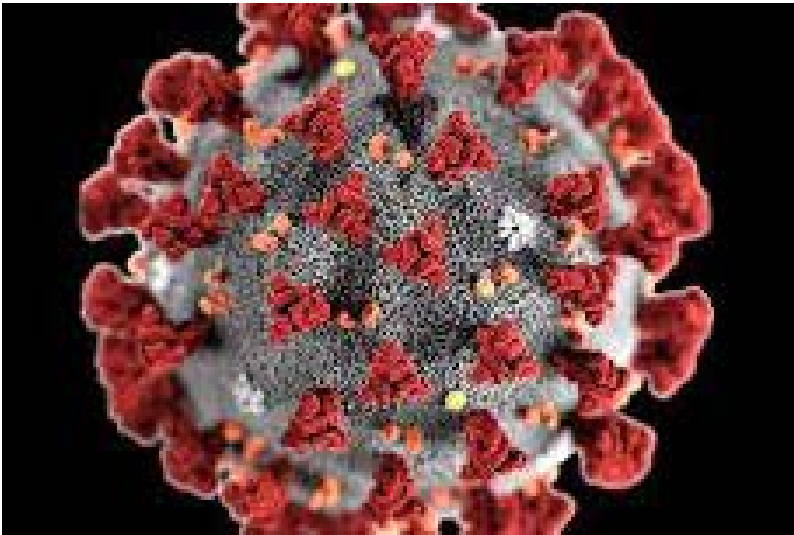


EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

*Established 1844 | Innovating Daily*

# LITIGATION DUE TO THE PANDEMIC



Jared J. Lefevre, Esq.

Eastman & Smith Ltd.

(419) 247-1461

[jjlefevre@eastmansmith.com](mailto:jjlefevre@eastmansmith.com)

# IN THE MIDST OF the pandemic:

- On March 9, 2020, Ohio Governor DeWine declared a state of emergency.
- Subsequent orders by Ohio's Director of Health closed bars and restaurants, limited the size of public gatherings, and even closed the polls
- On March 22, 2020, the Director issued her Stay at Home Order exempting only essential activities, businesses, and government functions.
- On March 24, 2020, Michigan Governor Whitmer's Stay at Home Order went into effect.
- Various of these orders have been modified, but remain in place. No one knows when they will be completely lifted.



## After the pandemic:

- What is happening as the pandemic continues on and these orders are being lifted or modified?
- Businesses will realize they lost money because purchases, projects, and deals were delayed or cancelled.
- They will want to blame someone for that loss.
- They will want to sue that someone for that loss.
- They will realize they might be sued for someone else's loss.

## Current examples:

- A buyer in Texas sought an injunction requiring the seller to complete a business acquisition.
- A buyer under a land contract sues the seller to force an extension of the closing date due to COVID-19.
- A restaurant sues its insurance broker for failing to make sure it had business interruption coverage.

# What should you do now?

- Find out what your contracts say about:
  - Delays?
  - Inability to perform?
  - Liquidated damages?
  - Extensions of time?
  - Notice requirements?
- This is necessary whether you have a claim to make or expect to receive a claim!

## GIVING NOTICE NOW.

- Notice requirements are of paramount concern.
- If contained in your contract, notice is almost certainly a prerequisite to making a claim later.
- Failure to give proper notice will likely waive the claim. *See Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. Franklin No. 08AP-487, 2009-Ohio-2164, ¶ 25.
- Now is the time to give the required notice.



## GIVING PROPER NOTICE.

- To give proper notice, you need to know:
  - When the notice has to be given;
  - To whom notice must be given;
  - How notice must be given; and,
  - The amount of detail required.

## GIVING NOTICE NOW.

- Notice should be given now even though information is incomplete.
- You may not know the extent of your loss, but give notice of what you do know.
- Refer to the states of emergency declared at the federal and state levels and identify the impacts already seen.
- Refer to the contract provisions governing notice.
- Supplement your initial notice as more information is known.

# DOCUMENTATION.

- Start documenting the impacts from the pandemic now.
- Don't wait to the end to compile your documentation.
- Examples include:
  - Labor shortages.
  - Decreased productivity from social distancing.
  - Material supply problems.

## DEFENSIVE STEPS.

- If you expect to face a claim, consider possible defenses.
  - “Force Majeure” (“Superior Force”)
  - Impossibility or Impracticability of Performance
  - Frustration of Purpose.

# FORCE MAJEURE.

- Refers to an event or effect that can be neither anticipated nor controlled; an act of God.
- Requires a Force Majeure contract clause:
  - **Force Majeure.** *Seller shall not be responsible for its failure to perform under this Agreement if such failure results from causes beyond its reasonable control, including, but not limited to: acts of God; strikes or other labor disturbances; equipment failure; power failure; inability to obtain suitable supplies, material, or parts; war; acts of terrorism; **epidemics**; floods; fires; accidents or other similar events, the non-occurrence of which was a basic assumption at time the Agreement was made.*
- May excuse a failure to perform.



## Impossibility or Impracticability of Performance.

- Does not require a specific contract clause.
- “[E]xcuses performance under a contract because it has been rendered impossible due to the occurrence of an unforeseeable event.” *Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 1st Dist. No. C-150572, 2016-Ohio-4611, 66 N.E.3d 1226, ¶ 15.
- “The performance must be rendered impossible without fault of the party asserting the defense and where the difficulties could not have been reasonably foreseen.” *Skilton v. Perry Local School Dist. Bd. of Educ.*, 11th Dist. Lake No. 2001-L-140, 2002-Ohio-6702, ¶ 26.

## Frustration of Purpose.

- Does not require a specific contract clause.
- A “companion doctrine” of impossibility.
- Performance remains possible, but such performance would produce a dramatically different result from what the parties anticipated when the contract was signed.
- Not widely accepted in Ohio. *Wells v. C.J. Mahan Const. Co.*, 10th Dist. Franklin No. 05AP-180, 2006-Ohio-1831, ¶ 18

## Consider insurance.

- Look at your policy for business interruption coverage.
- Governed by the terms of your policy.
- Since the SARS outbreak, many insurers have excluded coverage for “Loss Due to Virus or Bacteria.”
- Ohio House Bill 589 would require insurers who issued business interruption policies to cover losses due to COVID-19, even if such coverage was excluded by the policy.

# QUESTIONS?

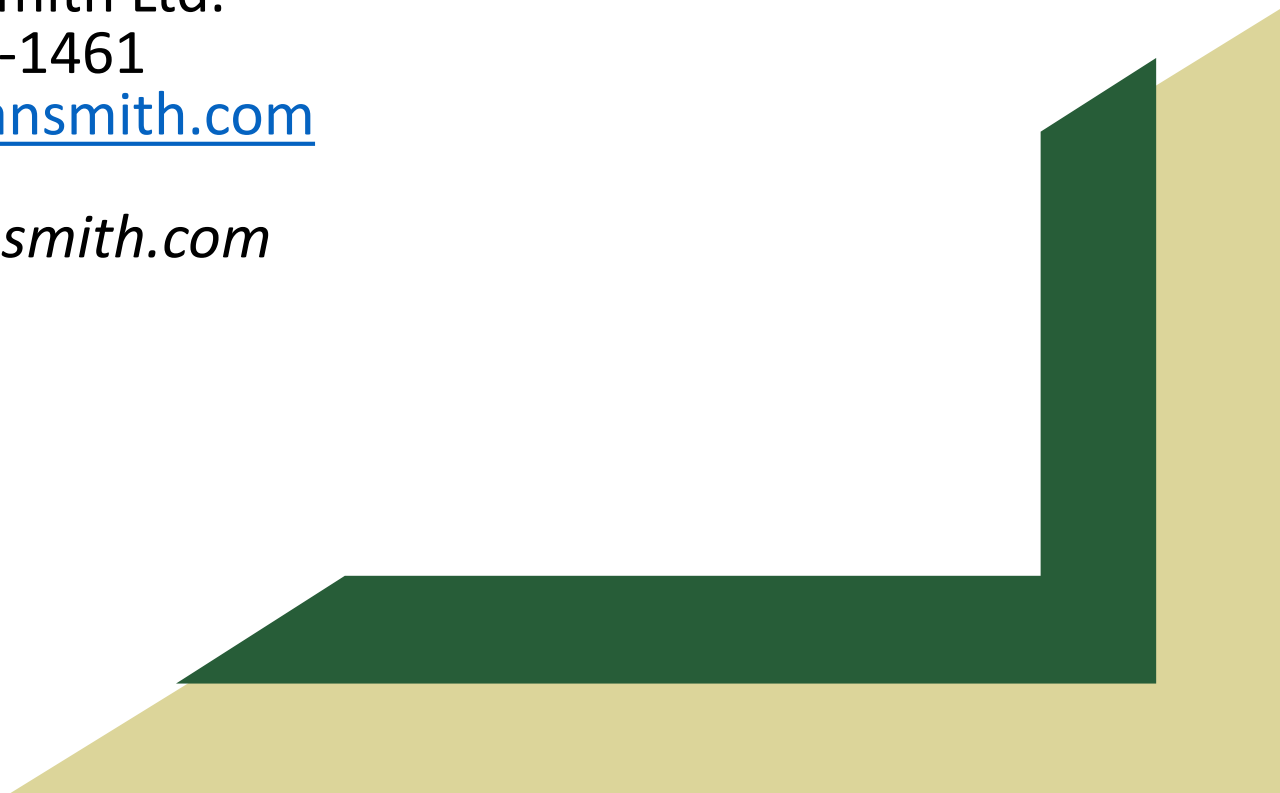
**Jared J. Lefevre, Esq.**

Eastman & Smith Ltd.

(419) 247-1461

[jjlefvre@eastmansmith.com](mailto:jjlefvre@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*

# OHIO'S IMMUNITY LEGISLATION (WITH A GLANCE AT MICHIGAN)

Stephen A. Roepke, Esq.

Eastman & Smith Ltd.

(419) 424-5847

[saroepke@eastmansmith.com](mailto:saroepke@eastmansmith.com)



# OHIO HOUSE BILL 606 – Passed 5.28.2020

Health Care Provider Immunity (3.9.2020 to 12.31.2020):

1. Broad Definition of Health Care Providers
2. Immunity From Tort Liability/Professional Discipline
3. Exceptions:
  - A. Tort Immunity
    - Reckless Disregard
    - Intentional Conduct
    - Willful or Wanton Misconduct
  - B. Professional Discipline
    - Gross Negligence

# OHIO HOUSE BILL 606 – Passed 5.28.2020

## General Immunity (3.9.2020 to 12.31.2020)

1. Immunity for “any person” if the civil action is based in whole or part, the injury, death, or loss is caused by:
  - Exposure to,
  - Transmission of; or
  - Contraction of MERS-CoV, SARS-CoV, or SARS-CoV-2
2. Exceptions:
  - Tort Immunity
    - Reckless Conduct (Heedless indifference)
    - Intentional Conduct
    - Willful or Wanton Misconduct

# OHIO SENATE BILL 308 – Passed 6.03.2020

## Health Care Provider Immunity (Declaration Date to 4.1.2021):

1. Broad Definition of Health Care Providers
2. Immunity From Tort Liability/Professional Discipline
3. Exceptions:
  - A. Tort Immunity:
    - Reckless Disregard
    - Willful or Wanton Misconduct
  - B. Professional Discipline
    - Gross Negligence

# OHIO SENATE BILL 308 – Passed 6.03.2020

- Qualified Civil Immunity (Declaration Date to April 21, 2021)
  1. Immunity for “service provider” if the civil action is based:
    - If, in whole or part, the illness, injury, death, or loss is caused by providing services that:
      - Are a result of, or
      - In response to,
      - A COVID 19 disaster or emergency, or intend to assist persons to recover
  2. Exceptions:
    - Reckless Conduct (heedless Indifference)
    - Willful or Wanton Misconduct

# Breadth of Ohio House “General Immunity” VS Ohio Senate “Qualified General Immunity”

## OHIO HOUSE:

“Any person” – Individual, corporation, business trust, estate, trust, partnership, association, school (for-profit, nonprofit, governmental, religious), or state institution of higher learning.

## OHIO SENATE:

“Service provider” – Any person (including that person’s owner, officer, director, employee or agent) that provides services defined as any activity, including manufacturing, that is part of or outside of a service provider’s normal course of business.



# MI SENATE BILL 899 – Passed 5.7.2020

## Health Care Immunity (During State of Emergency):

1. Broad Definition of Health Care Professionals and Health Care Facilities
2. Immunity From Liability For Providing Services at the behest of a State or Local Official
3. Exception - Willful or Gross Negligence

**Stephen A. Roepke, Esq.**  
Eastman & Smith Ltd.  
(419) 424-5847  
[saroepke@eastmansmith.com](mailto:saroepke@eastmansmith.com)

*[www.eastmansmith.com](http://www.eastmansmith.com)*



EASTMAN & SMITH LTD.

ATTORNEYS AT LAW

---

*Established 1844 | Innovating Daily*

# PPP Loan Forgiveness

A Refresher in Junior High Mathematics

Patrick A. Sadowski, Esq.  
Eastman & Smith Ltd.  
(419) 424-5847  
[pasadowski@eastmansmith.com](mailto:pasadowski@eastmansmith.com)

# Paycheck Protection Program Flexibility Act of 2020

- Modifies Minimum Loan Term – 5 Years from date of loan forgiveness application
  - Not retroactive – For Loans originated prior to June 5, 2020, lender can agree to modify loan term.
- Covered Period For Forgiveness Calculations Extended From 8 weeks to 24 weeks (with the outside date extended from June 30, 2020 to December 31, 2020)
- Deferral on Loan Payments Changed From 6 Months to the Date that the Forgiveness Amount is Remitted to Lender (or 10 months if the Borrowers fails to Submit a Forgiveness Application)

# PPPFA continued

- New Exemption to Reduction in Forgiveness for Employee Availability -- no reduction in forgiveness for reduction on FTEs if
  - Borrower is unable to rehire employees and unable to hire qualified individuals for unfilled positions; or
  - Borrower is unable to return to pre-February 15, 2020 levels of business activity due to compliance with CDC, OSHA or HHS requirements or guidance
- In Order to Qualify for Forgiveness Must Use 60% of Loan Proceeds for Payroll
- Safe Harbor for Reduction in Forgiveness (Exemption for Rehires) Extended from June 30, 2020 to December 31, 2020
- Allows PPP Borrowers to defer payroll taxes for 2020 with 50% due December 31, 2021, and the remainder due December 31, 2022.



# What the SBA Knows

## SBA Forms 2483 and 2484

- Your lender information
- Your contact information
- Your loan amount (average monthly payroll and number of employees)
- You are not a bad person (supposedly)



# Paycheck Protection Program Borrower Application Form

OMB Control No.: 3245-0407  
Expiration Date: 09/30/2020

|   |                                       |  |
|---|---------------------------------------|--|
| <b>Check One:</b><br><input type="checkbox"/> Sole proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC<br><input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual<br><input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization<br><input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other | <b>DBA or Tradename if Applicable</b> |  |
| <b>Business Legal Name</b>  |                                       |  |
| <b>Business Address</b>   |                                       |  |
| <b>Business TIN (EIN, SSN)</b>  | <b>Business Phone</b>                 |  |
|   | ( ) -                                 |  |
| <b>Primary Contact</b>  | <b>Email Address</b>                  |  |

|  |    |  |    |                      |  |
|--|----|--|----|----------------------|--|
| Average Monthly Payroll:   | \$ | x 2.5 + EIDL, Net of Advance (if Applicable)<br>Equals Loan Request: | \$ | Number of Employees: |  |
| <b>Purpose of the loan</b><br>(select more than one): <input type="checkbox"/> Payroll <input type="checkbox"/> Lease / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain): _____ |    |  |    |                      |  |

## Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

| Owner Name | Title | Ownership % | TIN (EIN, SSN) | Address |
|------------|-------|-------------|----------------|---------|
|            |       |             |                |         |
|            |       |             |                |         |

*If questions (1) or (2) below are answered "Yes," the loan will not be approved.*

| Question  | Yes                      | No                       |
|---|--------------------------|--------------------------|
| 1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?                     | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government? | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.  | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.  | <input type="checkbox"/> | <input type="checkbox"/> |

*If questions (5) or (6) are answered "Yes," the loan will not be approved.*

| Question   | Yes                      | No                       |
|--|--------------------------|--------------------------|
| 5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? | <input type="checkbox"/> | <input type="checkbox"/> |

Initial here to confirm your response to question 5 → \_\_\_\_\_



# Paycheck Protection Program Lender Application Form - Paycheck Protection Program Loan Guaranty

OMB Control No.: 3245-0407  
Expiration Date: 09/30/2020

The purpose of this form is to collect identifying information about the Lender, the Applicant, the loan guaranty request, sources and uses of funds, the proposed structure (which includes pricing and the loan term), and compliance with SBA Loan Program Requirements. This form reflects the data fields that will be collected electronically from lenders; no paper version of this form is required or permitted to be submitted. As used in this application, "Paycheck Protection Program Rule" refers to the rules in effect at the time you submit this application that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

## Instructions for Lenders

All Paycheck Protection Program (PPP) loans are processed by all Lenders under delegated authority from SBA. This application must be submitted and signed electronically in accordance with program requirements, and the information requested is to be retained in the Lender's loan file.

| A. Lender Information |  |
|-----------------------|--|
| Lender Name: _____    | Lender Location ID: _____                |
| Address: _____        | City: _____ St: _____ Zip: _____         |
| Lender Contact: _____ | Ph: ( ) - _____ Cell or Ext: ( ) - _____ |
| Contact Email: _____  | Title: _____                             |

| B. Applicant Information |  |
|--------------------------|--|
| Applicant                | Check One: <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor<br><input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization<br><input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other |
|                          | Applicant Legal Name: _____<br>DBA: _____ Business Tax ID: _____<br>Applicant Address: _____ City, State, Zip: _____<br>Applicant Primary Contact: _____ Phone: ( ) - _____  |

| C. Loan Structure Information  |    |              |      |                           |    |          |                 |
|--|----|--------------|------|---------------------------|----|----------|-----------------|
| Amount of Loan Request:  | \$ | Guarantee %: | 100% | Loan Term in # of Months: | 24 | Payment: | Deferred 6 mos. |
| Applicant must provide documentation to Lender supporting how the loan amount was calculated in accordance with the Paycheck Protection Program Rule and the CARES Act, and Lender must retain all such supporting documentation in Lender's file. |    |              |      |                           |    |          |                 |
| Interest Rate:   | 1% |              |      |                           |    |          |                 |

| D. Loan Amount Information  |    |
|---|----|
| Average Monthly Payroll multiplied by 2.5   | \$ |
| Refinance of Eligible Economic Injury Disaster Loan, net of Advance (if Applicable; see Paycheck Protection Program Rule) | \$ |
| <b>Total</b>  | \$ |

# Asking for Forgiveness

(mea culpa, mea culpa, mea maxima culpa)

- SBA Form 3508 published on May 15, 2020 – obsolete?
- Timing was intended to coincide with an 8 week covered period beginning with a 4/20/20 funding date
- New rules change the math. To what extent?
  - 60/40 payroll/nonpayroll ratio
  - 12/31/2020 date

# Asking for Forgiveness – SBA Form 3508



## Paycheck Protection Program Loan Forgiveness Application

OMB Control Number 3245-0407  
Expiration Date: 10/31/2020

### LOAN FORGIVENESS APPLICATION INSTRUCTIONS FOR BORROWERS

To apply for forgiveness of your Paycheck Protection Program (PPP) loan, you (the Borrower) must complete this application as directed in these instructions, and **submit it to your Lender** (or the Lender that is servicing your loan). Borrowers may also complete this application electronically through their Lender.

This application has the following components: (1) the PPP Loan Forgiveness Calculation Form; (2) PPP Schedule A; (3) the PPP Schedule A Worksheet; and (4) the (optional) PPP Borrower Demographic Information Form. All Borrowers must submit (1) and (2) to their Lender.

### Instructions for PPP Loan Forgiveness Calculation Form

**Business Legal Name (“Borrower”)/DBA or Tradename (if applicable)/Business TIN (EIN, SSN):** Enter the same information as on your Borrower Application Form.

**Business Address/Business Phone/Primary Contact/E-mail Address:** Enter the same information as on your Borrower Application Form, unless there has been a change in address or contact information.

**SBA PPP Loan Number:** Enter the loan number assigned by SBA at the time of loan approval. Request this number from the Lender if necessary.

**Lender PPP Loan Number:** Enter the loan number assigned to the PPP loan by the Lender.

**PPP Loan Amount:** Enter the disbursed principal amount of the PPP loan (the total loan amount you received from the Lender).

**Employees at Time of Loan Application:** Enter the total number of employees at the time of the Borrower’s PPP Loan Application.

**Employees at Time of Forgiveness Application:** Enter the total number of employees at the time the Borrower is applying for loan forgiveness.

**PPP Loan Disbursement Date:** Enter the date that you received the PPP loan proceeds from the Lender. If loan proceeds were received on more than one date, enter the first date on which you received PPP loan proceeds.

**EIDL Advance Amount:** If the Borrower received an Economic Injury Disaster Loan (EIDL) advance, enter the amount.



# Asking for Forgiveness – SBA Form 3508

## (Overview)

- Pay attention to definitions – read and understand them
- What are “eligible payroll costs”?
- What are “eligible nonpayroll costs”?
- Salary/Wage Reductions
- FTE Quotient
- Safe Harbors
- Putting it all together

# Asking for Forgiveness – SBA Form 3508

## (Eligible Payroll Costs)

- Included
  - Wages (including bonuses, commissions, tips)
  - Employer portion of state and local taxes
  - Contributions toward retirement plans, health insurance, paid leave, vacation, and severance
    - Though paid sick leave and family leave payments made under FFCRA are excluded
- Excluded
  - Employer portion of federal taxes
  - Employer portion of FICA, FUTA
  - Health insurance premiums or retirement plans for self-employed individuals
  - Costs associated with employees residing outside of U.S.



# Asking for Forgiveness – SBA Form 3508

## (Eligible Payroll Costs)

- Capped at \$15,385/employee for covered period --  $(\$100,000/52) * 8$  weeks
  - Gee, thanks – loan amount was  $2.5 \times (\$100,000/12) = \$20,833.33$
  - Gap of ~\$5,500; break even is at \$73,848
  - Endeavor to spend difference on eligible nonpayroll expenses
  - Will this number change in light of PPPFA?
- Can include cost incurred or actually paid
  - If incurred prior to start of covered period, but paid during covered period = ok to include
  - If incurred prior to end of covered period, but paid after covered period = ok to include, so long as payment is made at next regular payroll date

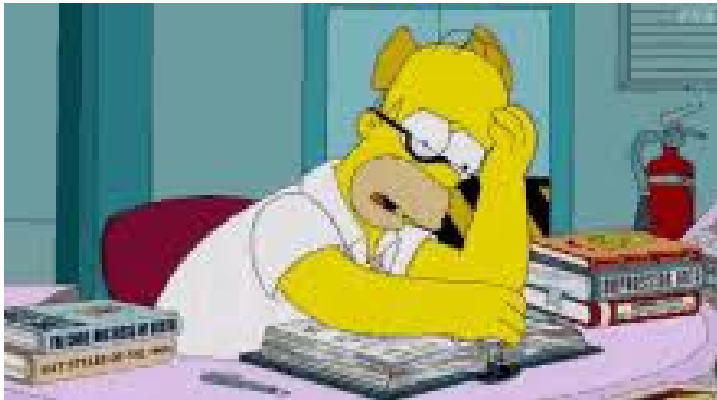
# Asking for Forgiveness – SBA Form 3508

## (Eligible Nonpayroll Costs)

- Utilities
  - Electricity, gas, water, transportation, telephone, and internet
  - “transportation” = just like reporting costs on your tax return
    - Either standard mileage rates; or
    - Actual expenses incurred during covered period (gas, oil, repairs)
    - Currently, only guidance from SBA deals with self-employed individuals, but presumably this will apply for everyone
- Mortgage interest for real or personal property
- Rent/Lease payments for real or personal property
- Such costs must already be in existence by 2/15/2020 to qualify; cannot prepay
- Such costs must be paid or incurred during the covered period

# Asking for Forgiveness – SBA Form 3508

## Completing the Form – Schedule A (more definitions)



Paycheck Protection Program  
Loan Forgiveness Application

OMB Control Number 3245-0407  
Expiration Date: 10/31/2020

### Instructions for PPP Schedule A Worksheet

Complete the PPP Schedule A Worksheet or obtain an equivalent report from the Borrower's payroll system or payroll processor.

#### Table Instructions

**Employee's Name:** Separately list each employee. Do not include any independent contractors, owner-employees, self-employed individuals, or partners.

**Employee Identifier:** Enter the last four digits of each employee's Social Security Number.

**Cash Compensation:** Enter the sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the Alternative Payroll Covered Period. For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the Covered Period; therefore, do not enter more than \$15,385 in Table 1 or Table 2 for any individual employee.

**Average FTE:** This calculates the average full-time equivalency (FTE) during the Covered Period or the Alternative Payroll Covered Period. For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. A simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours may be used at the election of the Borrower.

This calculation will be used to determine whether the Borrower's loan forgiveness amount must be reduced due to a statutory requirement concerning reductions in full-time equivalent employees. Borrowers are eligible for loan forgiveness for certain expenditures during the Covered Period or the Alternative Payroll Covered Period. However, the actual loan forgiveness amount that the Borrower will receive may be less, depending on whether the Borrower's average weekly number of FTE employees during the Covered Period or the Alternative Payroll Covered Period was less than during the Borrower's chosen reference period (*see* Instructions to PPP Schedule A, Line 11). The Borrower is exempt from such a reduction if the FTE Reduction Safe Harbor applies. See the FTE Reduction Safe Harbor instructions below.

**Salary/Hourly Wage Reduction:** This calculation will be used to determine whether the Borrower's loan forgiveness amount must be reduced due to a statutory requirement concerning reductions in employee salary and wages. Borrowers are eligible for loan

# Asking for Forgiveness – SBA Form 3508



Paycheck Protection Program  
Loan Forgiveness Application

OMB Control Number 3245-0407  
Expiration Date: 10/31/2020

## PPP Schedule A Worksheet

- Complete Schedule A tables first
- Table 1 = employees whose compensation was <\$100,00
- Table 2 = employees whose compensation was \$100,000+
- For every employee in the covered period, you must calculate:
  - Total cash compensation
  - Salary/Hourly Wage Reduction
  - Average FTE

**Table 1:** List employees who:

- Were employed by the Borrower at any point during the Covered Period or the Alternative Payroll Covered Period whose principal place of residence is in the United States; and
- Received compensation from the Borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019 or were not employed by the Borrower at any point in 2019.

| Employee's Name           | Employee Identifier | Cash Compensation | Average FTE | Salary / Hourly Wage Reduction |
|---------------------------|---------------------|-------------------|-------------|--------------------------------|
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
|                           |                     |                   |             |                                |
| FTE Reduction Exceptions: |                     |                   |             |                                |
| Totals:                   |                     | Box 1             | Box 2       | Box 3                          |

# Asking for Forgiveness – SBA Form 3508

Salary/Hourly Wage Reduction Ratio (sharpen your pencils)

- Salary/Hourly Wage Reduction
  - If an employee's compensation was reduced by more than 25% during the covered period, your forgiveness may be reduced
  - For each employee:
    - Take average annual or hourly wage during the covered period and divide by such employee's average annual or hourly wage from 1/1/2020 to 3/31/2020
    - If 0.75 or more, no adjustment is necessary
    - If  $<0.75$ , determine if Safe Harbor is met

# Asking for Forgiveness – SBA Form 3508

## Salary/Hourly Wage Reduction Ratio (continued)

- Safe Harbor
  - Determine employee's annual salary or hourly wage as of 2/15/2020
  - If such employee's annual salary or hourly wage decreased from 2/15/2020 to 4/26/2020, and if by 6/30/2020 the borrower restores such employee's salary/wage to his or her 2/15/2020 levels, then the safe harbor is met
  - PPPFA?



# Asking for Forgiveness – SBA Form 3508

## Salary/Hourly Wage Reduction Ratio (continued)

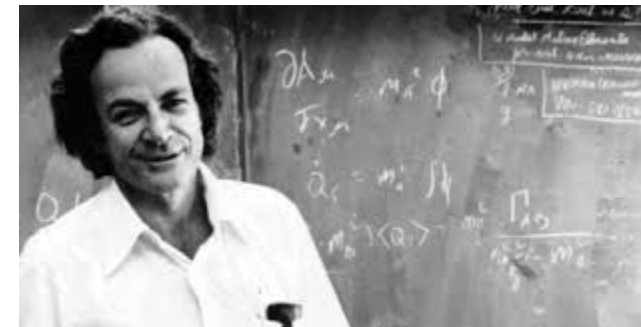
- Calculating the reduction -- assuming no Safe Harbor applies:
  - A = annual salary or hourly wage from 1/1/2020 to 3/31/2020 (multiply by 0.75)
  - B = annual salary or hourly wage during covered period
  - H = average number of hours worked per week from 1/1/2020 to 3/31/2020
  - Multiply this number by 8 weeks

$[(A * 0.75) - B] * H * 8 = \text{reduction in forgiveness for a particular employee}$

If the employee is salaried, the formula will be as follows:

$$[(A * 0.75) - B] * 8/52$$

**PPPFA?**



# Asking for Forgiveness – SBA Form 3508

(Full Time Equivalency – More Math)

- Wage/Salary Reduction = per employee analysis; FTE = aggregate payroll analysis
- Calculating the Full Time Equivalency Quotient
  - FTE, generally = average hours per week/40
  - Cannot exceed 1.0 per employee (note EMPLOYEE – owner not included)
    - 1.0 per salaried employee
  - SBA allows borrower to use 1.0 for employees who work 40+ hours per week and 0.5 for employees who work <40 hours per week (must be consistent)
  - Goal: the higher the FTE number during the covered period, the better
  - Calculate FTE per employee, add total for all employees

# Asking for Forgiveness – SBA Form 3508

(Full Time Equivalency – More Math)

- FTE Reduction Exceptions -- you may include in the FTE calculations:
  - any position for which the Borrower made a good-faith, *written* offer to rehire an employee during the covered period, which was rejected by the employee;
  - any employees who during the covered period were (a) fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction in their hours
- PPPFA Update – further exception if borrower is able to document:
  - An inability to rehire individuals who were employees of borrower on 2/15/2020
  - An inability to hire similarly qualified employees for unfilled positions on or before 12/31/2020
  - Is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

# Asking for Forgiveness – SBA Form 3508

(Full Time Equivalency – More Math)

- Determining the FTE quotient:
  - Numerator is the FTE during covered period
  - Denominator is the FTE during (borrower's choice):
    - February 15, 2019 to June 30, 2019
    - January 1, 2020 to February 29, 2020
    - For seasonal employees, a consecutive twelve-week period between May 1, 2019 and September 15, 2019
- Goal when choosing your denominator: make it as small as possible



# Asking for Forgiveness – SBA Form 3508

(Full Time Equivalency – More Math)

- FTE Quotient  $<1.0$ ? Check the FTE Safe Harbor
- PPPFA?

## FTE Reduction Safe Harbor

A safe harbor under applicable law and regulation exempts certain borrowers from the loan forgiveness reduction based on FTE employee levels. Specifically, the Borrower is exempt from the reduction in loan forgiveness based on FTE employees described above if both of the following conditions are met: (1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020.

# Asking for Forgiveness – SBA Form 3508

(Full Time Equivalency – More ... Backwards Math)

- FTE on Schedule A

Full-Time Equivalency (FTE) Reduction Calculation

If you have not reduced the number of employees or the average paid hours of your employees between January 1, 2020 and the end of the Covered Period, check here ☐, skip lines 11 and 12 and enter **1.0** on line 13.

Line 11. Average FTE during the Borrower's chosen reference period:

---

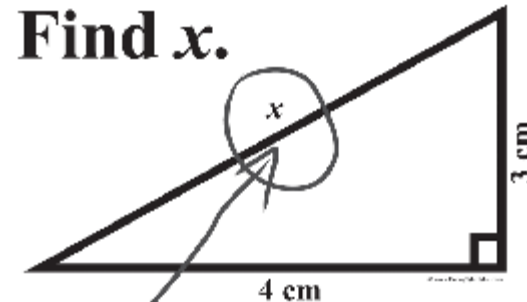
Line 12. Total Average FTE (add lines 2 and 5):

---

Line 13. FTE Reduction Quotient (divide line 12 by line 11) or enter 1.0 if FTE Safe Harbor is met:

---

**Find  $x$ .**



*Here it is*



# Asking for Forgiveness – SBA Form 3508

(FTE and Salary/Wage Reduction – Double Whammy?)

- If an employer reduces an employee's hours which results in a reduction in pay, will that affect both FTE and Salary/Wage Reduction calculations?
  - No. Borrower will only be subject to Salary/Wage Reduction for the portion of the decline in employee salary/wages not attributable to the FTE reduction
  - E.g. if the borrower reduces the number of hours for a full-time employee but does not reduce the hourly wage, the reduction in the employee's total wages will be entirely attributable to the FTE reduction



# Asking for Forgiveness – SBA Form 3508

(Putting it All Together)

- You have now successfully calculated your salary/wage reduction (hopefully 0)
- And your FTE quotient (hopefully 1.0)
- And completed all of Schedule A
- Time to complete the actual forgiveness application

# Asking for Forgiveness – SBA Form 3508

(Putting it All Together)

- Your PPP loan forgiveness amount will be the least of:
  - Line 8 -- Your total PPP loan amount, less the salary/hourly wage reduction, multiplied by the FTE quotient; or
  - Line 9 -- The total PPP loan amount; or
  - Line 10 -- Payroll Cost 75% Requirement (what's this?)
    - Total payroll costs divided by 0.75 – ensures at least 75% of potential forgiveness amount was used for payroll
    - PPPFA – form will be updated to divide by 0.60

# Asking for Forgiveness – SBA Form 3508

(Putting it All Together)

- Timing
  - Submit application to bank – bank has 60 days to make a “good faith” review of the application
  - Bank will then notify SBA of proposed requested forgiveness amount – SBA has 90 days to approve/change forgiveness amount
  - SBA has 6 years to audit borrower – keep your records!
  - Borrower has right to appeal an adverse decision from SBA

# Asking for Forgiveness – SBA Form 3508

(Putting it All Together)

- You have a balance due and owing – now what?
  - PPPFA now gives borrower 60 months to payback balance (originally 18 months); interest still remains 1%
  - Discuss with lender timing of payments
- Remember, new ratios will be 60/40
- Will changes to the covered period (24 weeks instead of 8 weeks, 12/31/2020 instead of 6/6/2020) affect FTE denominator choices? Calculations of the wage/salary deductions? Safe harbor provisions?
- Wait for update to Form 3508 before seeking forgiveness
- Don't forget to show your work! (provide documentation)

**Patrick A. Sadowski, Esq.**  
Eastman & Smith Ltd.  
(419) 424-5847  
[pasadowski@eastmansmith.com](mailto:pasadowski@eastmansmith.com)

