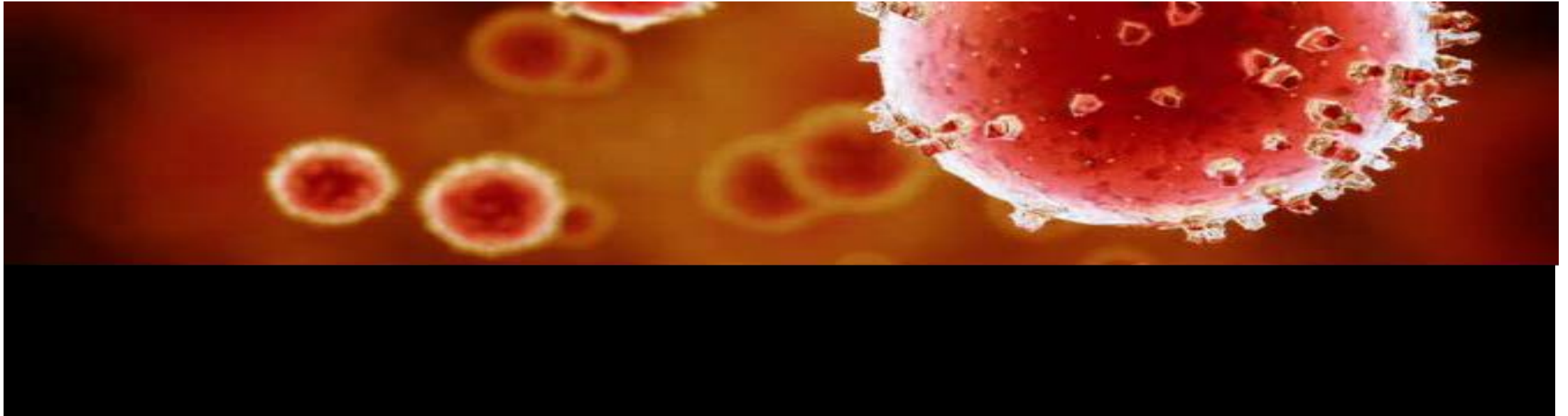


AIMS Legal Update #4 on COVID-19

May 7, 2020



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In case you had not noticed...

“This is a period of radical uncertainty, an order of magnitude greater than anything we are used to”. Adam Tooze, Columbia U.



Time for Disclaimers!

- These slides are provided only for education and information
- Not legal, medical or public health advice.
- Schools should not rely on, or act on the basis of these slides.
- You should get legal advice from the school's own attorney.
- The information on these slides is subject to change and may become outdated quickly.
- Check with your school attorney for the latest information.



Agenda

- Update on PPP: Permitted uses, PR, optics, new standards for good faith certification, audits
- Bolstering good faith certification to prepare for forgiveness or audit by SBA
- Reducing risk of lawsuits after restart (pre-vaccine)
 - Standard of care
 - Insurance
 - Return to School Agreement
- Legal Potpourri
 - Class action litigation for tuition refund at colleges
 - Antitrust

Permitted uses for PPP loans and forgiveness

- Payroll costs, including compensation; vacation, parental, family, medical or sick leave; severance payments; payments for group healthcare benefits (including insurance premiums); retirement benefits; and state and local employment taxes
- Rent payments
- Utility payments
- Interest on mortgage payments
- 75% for payroll costs for forgiveness

Certification for PPP

- Current economic uncertainty makes this loan request necessary to support ongoing operations.
- New standard after application for receiving a loan from pressure on administration to give more warnings.
- Borrowers must certify in good faith that PPP loan request is necessary, taking into account ability to access other sources of liquidity sufficient to support ongoing operations in manner that is not *significantly detrimental* to business.
- Not a statute or regulation, and not part of the law - but don't ignore it.

Abuses caused rules change in 3rd quarter

Shake Shack, Ruth Chris, LA Lakers returned PPP loans after public shaming, FAQ #31

300 publicly traded companies received more than \$1 billion in PPP funds, including 43 companies with more than 500 workers.

Some pay executives \$2 million or more.

Of first PPP pool of \$349 billion, more than 80% of applicants without funding.

270 public companies received \$988 million in PPP loans.

Sec of Treasury said all loans of over \$2million will be audited (unclear if audit focuses on certification or forgiveness criteria)

24 public companies returned \$235 million by 4.28.20

✕	Company		Market Cap	Filing Date	Returned	SBA Loan Amount
+	Energy Services of America Corporation	ESOA (OTC)	\$ -	Apr 29, 2020	<input checked="" type="checkbox"/>	\$ 3,300,000.00
+	Castlight Health, Inc.	CSLT (NYSE)	\$ 108,571,672	Apr 28, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00
+	Nathan's Famous, Inc.	NATH (NASDAQ)	\$ 251,703,737	Apr 27, 2020	<input checked="" type="checkbox"/>	\$ 1,224,645.00
+	IDT Corporation	IDT (NYSE)	\$ 146,244,593	Apr 24, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00
+	TransMedics Group, Inc.	TMDX (NASDAQ)	\$ 381,407,988	Apr 24, 2020	<input checked="" type="checkbox"/>	\$ 2,249,280.00
+	BioLife Solutions, Inc.	BLFS (NASDAQ)	\$ 223,747,123	Apr 24, 2020	<input checked="" type="checkbox"/>	\$ 2,175,320.00
+	Fiesta Restaurant Group, Inc.	FRGI (NASDAQ)	\$ 169,840,164	Apr 23, 2020	<input checked="" type="checkbox"/>	\$ 5,000,000.00
+	Hallmark Financial Services, Inc.	HALL (NASDAQ)	\$ 65,786,828	Apr 22, 2020	<input checked="" type="checkbox"/>	\$ 8,311,000.00
+	CalAmp Corp.	CAMP (NASDAQ)	\$ 217,933,048	Apr 21, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00
+	Shake Shack Inc.	SHAK (NYSE)	\$ 1,954,361,050	Apr 21, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00
+	Aquestive Therapeutics, Inc.	AQST (NASDAQ)	\$ 146,082,718	Apr 20, 2020	<input checked="" type="checkbox"/>	\$ 4,830,000.00
+	Ultralife Corporation	ULBI (NASDAQ)	\$ 111,253,523	Apr 17, 2020	<input checked="" type="checkbox"/>	\$ 3,459,278.00
+	J. Alexander's Holdings, Inc.	JAX (NYSE)	\$ 68,903,593	Apr 16, 2020	<input checked="" type="checkbox"/>	\$ 15,100,000.00
+	Escalade, Incorporated	ESCA (NASDAQ)	\$ 107,277,211	Apr 16, 2020	<input checked="" type="checkbox"/>	\$ 5,627,500.00
+	OptiNose, Inc.	OPTN (NASDAQ)	\$ 183,624,648	Apr 16, 2020	<input checked="" type="checkbox"/>	\$ 4,400,000.00
+	Ballantyne Strong, Inc	BTN (NYSE MKT)	\$ -	Apr 16, 2020	<input checked="" type="checkbox"/>	\$ 3,173,900.00
+	BK Technologies Corporation	BKTI (NYSE MKT)	\$ -	Apr 16, 2020	<input checked="" type="checkbox"/>	\$ 2,196,335.00
+	Kura Sushi USA, Inc.	KRUS (NASDAQ)	\$ 121,366,934	Apr 15, 2020	<input checked="" type="checkbox"/>	\$ 5,983,290.00
+	Fiesta Restaurant Group, Inc.	FRGI (NASDAQ)	\$ 169,840,164	Apr 14, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00
+	Wave Life Sciences Ltd.	WVE (NASDAQ)	\$ 326,072,043	Apr 14, 2020	<input checked="" type="checkbox"/>	\$ 7,234,890.00
+	Ruth's Hospitality Group, Inc.	RUTH (NASDAQ)	\$ 278,492,994	Apr 13, 2020	<input checked="" type="checkbox"/>	\$ 20,000,000.00
+	Potbelly Corporation	PBPB (NASDAQ)	\$ 72,332,760	Apr 13, 2020	<input checked="" type="checkbox"/>	\$ 10,000,000.00

“Think Twice, Mnuchin Tells Prep Schools Seeking Virus Loans”

- It has come to our attention that some private schools with significant endowments have taken [#PPP](#) loans. They should return them. 5.1.20, [@SBAgov](#)
- [#CARESAct #PPPLoans](#)
- <https://www.politico.com/news/2020/05/01/mnuchin-urges-elite-k-12-schools-to-return-federal-rescue-loans-228964>
- <https://www.nytimes.com/2020/05/01/us/prep-schools-coronavirus-loans.html?action=click&module=Top%20Stories&pgtype=Homepage>
- SBA will likely make all names of borrowers public
- Lindblad Expeditions pressured as public company to return loan, now laying off workers:
 - https://www.washingtonpost.com/opinions/my-firm-was-attacked-for-taking-a-ppp-loan-so-we-returned-it-now-we-face-layoffs/2020/05/01/0610c636-8bed-11ea-8ac1-bfb250876b7a_story.html

Question 31, FAQs 4.23.20 (excerpts)

- Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?
- Answer: ...all borrowers must assess their economic need for a PPP loan under standard established by CARES Act, PPP regulations at time of loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere, borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, basis for certification. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. (now updated to May 14, 2020 through FAQs updated 5.5.20)

Audits – FAQ 39, 4.29.20

Question: Will SBA review individual PPP loan files?

Answer: Yes. In FAQ #31, SBA reminded all borrowers of important certification required to obtain PPP loan. To further ensure PPP loans are limited to eligible borrowers in need, SBA will review all loans in excess of \$2 million, in addition to other loans as appropriate, following submission of loan forgiveness application. Additional guidance implementing this procedure will be forthcoming.

Answers raise more Questions

- Treasury Sec. Mnuchin: intent of PPP not for companies with access to “plenty of liquidity,” even though PPP waived any requirement to be unable to access credit elsewhere or for collateral or personal guarantees.
- Q #31 provides safe harbor to return monies by May 7, 2020.
- No guidance on how school can demonstrate to SBA basis for certification or what consequences borrowers face for not returning the money.
- No guidance on meaning of access to “liquidity sufficient to support...ongoing operations in a manner that is not significantly detrimental to business”
- Will audit focus on certification or forgiveness or both?
- Treasury, SBA to issue new guidance on audits

Recent update to FAQs

- <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>
- Extends safe harbor to return funds to May 14, 2020 if you have second thoughts on certification
- Will not be penalized on employee headcount if you make a good faith offer to restore job (same salary, hours) and employee declines
- Need documentation of offer letter

Bolstering good faith certification with financial modeling, forecasts

- Convene Board
- Prepare financial predictions with assumptions on declining enrollment, increased requests for financial aid, diminished contributions, loss of ancillary revenues, diminished endowment or reserves, write-offs of current obligations, tuition refunds, tuition deferment to project deficit.
- Assess viability of reserves or endowment (if any), why endowment is not accessible or liquid (may be already taking draw, funds restricted by donors or board, endowment or investment policy may prohibit larger draws, significantly detrimental to use reserves or endowment and harmful to ongoing operations)
- Assess access to line of credit, other cash (may not be appropriate for payroll, conditions to line of credit, other loans outstanding)
- Record should reflect that other sources of liquidity do not solve your problem, need PPP loan.
- Have thoughtful analysis reflecting rationale for PPP loan if you are audited or challenged later

Board resolution, minutes

- Prepare board resolution/insert for Minutes reaffirming good faith certification, necessity of PPP loan, addressing why endowment is not available (at least at greater levels than already taking), commitment to use PPP funds for authorized uses (payroll, rent, interest, utilities), addressing other sources for liquidity
- Attach operations scenarios to minutes of meeting.
- Explain impact of pandemic on schools, government shut down orders, operational challenges of distance learning
- Consider reputational, PR risk, risk of unfavorable audit and whether you have access to other funds without doing significant harm to operations.

Preparing for audit

- Have Board resolution with supporting information
- Track expenditures from segregated funds
- Follow, document direction from lender
- Assemble documents relating to expenditures (i.e., payroll records, leases for lease payments; utility bills)

Audit process

- SBA to provide additional guidance
- Audits likely conducted by SBA Inspector General –
- Be prepared for review of documents relating to:
 - Forgiveness
 - Loan eligibility
 - Good faith certification
 - Use of loan proceeds
- Audits could lead to investigation, subpoena
- Possible liability under False Claims Act for knowingly submitting false claim to government or making a false statement to get a false claim paid by government
- Civil penalties and treble damages

First complaint for fraud by DOJ under PPP

- DOJ filed first criminal complaint against two people in RI Applications requested over \$.5 million in PPP loans falsely stating there were dozens of employees at several businesses.
- Charged with conspiracy to make false statement to SBA, conspiracy to commit bank fraud
- Businesses that allegedly needed the loans did not exist before start of pandemic, no salaried employees.

Forgiveness of PPP loan

- Based on amount used over 8-week period after receipt
- Use at least 75% for payroll, no more than 25% for other uses for forgiveness.
- Reduction of salary by more than 25% will hurt forgiveness
- Rehire previously laid off workers before June 30, 2020 (for changes made between Feb. 15, 2020 and April 26, 2020) – get to same number, employees can be different.
- Lender has 60 days to make decision
- Show your calculations, begin documenting as soon as you get loan \$\$

Standard of care for school after Restart pre-vaccine

- School required to comply with standard of care of reasonable, not perfect school.
- School to comply with degree of prudence that reasonable school would exercise.
- Distinction between reasonable and best practices
- Try to exceed reasonable standard.
- Schools should not be liable if they follow reasonable practices, guidelines of consultants, and document actions.
- Documentation for court/jury reviewing 3 years later.
- Follow, retain, document guidelines on cleaning campus (CDC guidelines), protecting employee and students (government authorities, consultants, CDC, EEOC, OSHA), testing (governmental authorities, consultants).
- Will record reflect you took reasonable steps to mitigate risks for employees, students?
- No obligation or ability to eliminate all risks.

Restart
legalities –
follow official
guidance

- CDC guidance on cleaning, disinfecting schools:
<https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>

<https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>

- CDC guidelines on handwashing
<https://www.cdc.gov/handwashing/when-how-handwashing.html>

- General CDC guidelines
<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools-faq.html>

Do not give guarantee of safety after Restart

- Students, staff at risk of infection after Restart regardless of policies, protocols
- No guarantee of protection
- No statutory immunity like public schools
- No strategy will guarantee schools will not be subject to litigation or win court case.
- Don't overpromise "safety" – concentrate on risk mitigation measures.
- K-12 resource:
<https://www.mckinsey.com/industries/social-sector/our-insights/safely-back-to-school-after-coronavirus-closures>
- Higher ed resource:
<https://www.mckinsey.com/industries/public-sector/our-insights/coronavirus-how-should-us-higher-education-plan-for-an-uncertain-future>

“Inertia is the most powerful force in human events.”

(Maurice Strong, Canadian philosopher)



- Definition: a tendency to do nothing or to remain unchanged, or a property of matter by which it continues in its existing state of rest, unless that state is changed by an external force.
- How can we overcome inertia in planning for restart?
- Your planning and government recommendations will be the “external force” making change in your school.

Beijing Educational Commission Restart guidelines



Health screening for all students, adults



Staff training on prevention, protection, protocols



Disinfect buildings and ventilate spaces



Ensure all returning staff, students have 14-day quarantine in local area



Assure adequate supply of soap, sanitizers, masks, cleaning products




Set up temporary isolation areas for students who show symptoms



Formulate emergency plans if outbreak occurs

Taiwanese children remove masks when dividers up





<https://www.cnn.com/2020/04/17/europe/denmark-coronavirus-first-school-intl/index.html>

Denmark reopened schools

<https://www.cnn.com/2020/04/17/europe/denmark-coronavirus-first-school-intl/index.html>

- Reconfigured classrooms
- Desks 6 ft apart
- Multiple entrances in small groups closest to classrooms,
- Classes divided into smaller subgroups with aides
- Kids play only with other kids in same class outside
- One teacher for each group, no switching
- Physical distancing, play in small groups
- Instruction outside as much as possible
- Handwashing every hour
- No parents or visitors
- Teachers cannot gather together
- Library closed
- Many families held children back from school until they were satisfied

How will Restart look pre-vaccine?

- Temperature checks by school and parents
- Masks, gloves
- Ask about testing, health status of employees, students.
- Testing for school community
- Fitness to return to school after illness
- Contact tracing.
- No school assemblies, break rooms
- Rethink food service, central eating space; snacks, lunch to classroom
- No large gatherings, parent events.
- No handshakes, hugs, greetings.
- Arts, musicals, performances?
- Handwashing on entry, every hour

Restart pre-vaccine

Social distancing practices everywhere, including buses, bathrooms, carpool line, playing fields.

Square foot requirements per child?

Smaller classes in non-classroom space

Screen visitors, employees on health issues.

Question employees, students on travel.

Stagger classes, arrivals, schedule to maintain social distancing.

Regular, frequent surface cleaning, disinfection, enough supplies and people.

Which sports will mitigate risks.

Follow CDC guidelines on disinfecting schools.

Stagger visits to restrooms

Can small children socially distance? If not, consider containment as alternative.



What if?

- School is open, but families and staff are not confident enough to attend.
- Can you have in-person classes and distance learning too?
- School opens in fall '21, but closes again due to second wave.
- No vaccine until 2021 or 2022 or beyond.
- Families may be focused on health, getting enough food and keeping lights on.

Strategies to minimize lawsuits after Restart (pre-vaccine)

1. Follow governmental, public health, expert recommendations.
2. Document that you followed recommendations.
3. Develop policies, protocols on safety, cleaning, handwashing, physical distancing, eating, sharing supplies.
4. Train faculty, students on changes in policies, protocols
5. Consult with insurance brokers to determine available insurance protection if staff, students get infected.
6. Communicate with parents on new policies, protocols to mitigate risks (do not promise “safety”,
7. Consider Return to School Agreement including release with informed consent to mitigate risks; require cooperation of families.
8. Courts more likely to uphold release if parents are educated about school policies and protocols, understand and accept the risks pre-vaccine.
9. Create task forces, tap board members and faculty to serve, divide work into buckets (facility configuration, cleaning, medical issues, academic content, etc.)
10. No one person has the answers – truly takes a village.

Legal potpourri: Class action suits, tuition refunds

- Ad:
 - Are you a college student who was forced to leave campus?
 - You may be entitled to compensation.

Headline: [Colleges Won't Refund Tuition. Autumn May Force a Reckoning.](#)

- <https://www.nytimes.com/2020/05/01/your-money/college-tuition-refunds-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage>

Colleges revising website and promotional materials

- Colleges, universities facing backlash, federal class action lawsuits for transition to online courses
- Students seeking reimbursement of tuition based on breach of contract, unjust enrichment, lack of access to in-person instruction, campus facilities, student activities.
- Colleges need to prove they deliver on promises made to students and students still receiving benefits
- Cases may turn in part on what college promised students on website and in promotional materials.
- Colleges to tweak website to account for distance learning, online instruction
- Tip: Have consistent communications in response to complaints about remote learning, tuition refund.

Antitrust

- DOJ/FTC looking for antitrust violations:

<https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-jointly-issue-statement-covid-19-and>

- DOJ interest in:
 - Exchange of employee salary information
 - Price-fixing
 - Agreement with competitors on salary, courses, admissions, no-poach agreements
 - Hiring, recruiting, retention of staff
 - Agreement on tuition
 - Benefits, hours worked
- Do not make agreements with competitor schools.
- Regulators want marketplace to determine these things, not competitors reaching agreement.
- While you may view other schools as colleagues, regulators consider them competitors.

Let's take a breath





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Q and A