

Strategies and Pitfalls for Retaining, Terminating and Returning Employees to Work in the World of COVID-19



COVID-19

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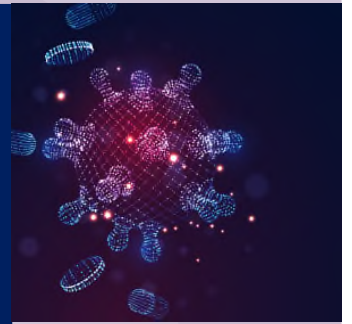
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Introduction

- Retaining employees
- Laying employees off
- Returning employees to work



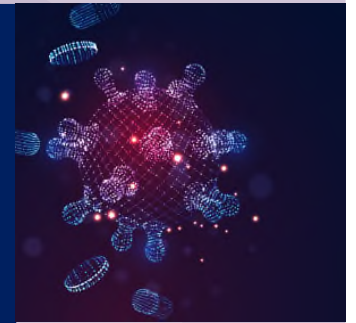
Strategies and Pitfalls for Retaining Employees



Reducing Hours/Pay

FLSA considerations for exempt employees

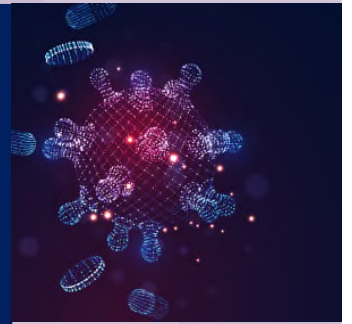
- Generally must receive their full salary in any week in which they perform any work, with limited exceptions
- Not required to pay them for any weeks in which no work is performed
- Can require them to use PTO in lieu of working



Reducing Hours/Pay

FLSA considerations for exempt employees

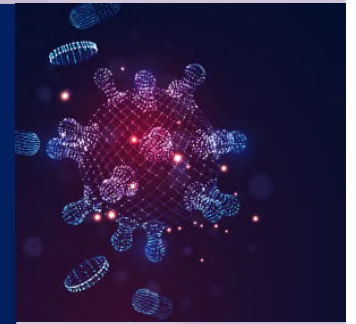
- Can reduce their salaries prospectively based on long-term business needs
 - Cannot reduce pay below salary threshold: \$684/week
 - Short-term or week-to-week reductions are impermissible
- Could pay them hourly instead, but:
 - More burdensome to administer
 - Eligible for overtime when business picks up



Reducing Hours/Pay

FLSA considerations for nonexempt employees

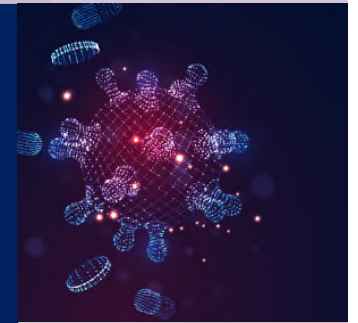
- Only required to pay hourly wage for hours actually worked, so generally easier to reduce hours than hourly wage
- Cannot reduce hourly wage below Michigan's minimum wage: \$9.65/hour
- Mandatory bargaining subject for union employees



Reducing Hours/Pay

Unemployment considerations

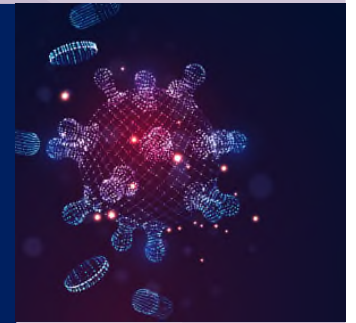
- Partial unemployment in Michigan
 - Fully unemployed weekly benefits calculated as roughly half of weekly wages, up to a maximum of \$362/week
 - Partially unemployed employees should qualify for benefits provided their weekly wages are less than 1.5 x their fully unemployed weekly benefits
 - Partially unemployed employees who qualify for even \$1 of weekly state benefits should also qualify for an additional \$600 (Federal Pandemic Unemployment Compensation) through July



Reducing Hours/Pay

Unemployment considerations

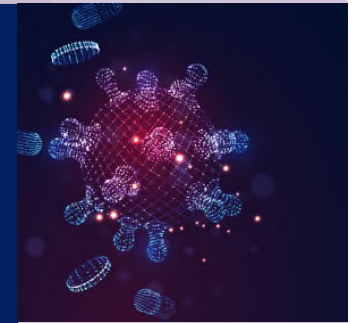
- Work Share in Michigan
 - Employer must submit proposed Work Share plan for state approval
 - Work Share employees can work a reduced number of hours and also receive a portion of their fully unemployed weekly benefits commensurate with their hours reduction
 - Work Share employees should also qualify for an additional \$600 (Federal Pandemic Unemployment Compensation) through July



Tax Credits

CARES Act Employee Retention Tax Credit

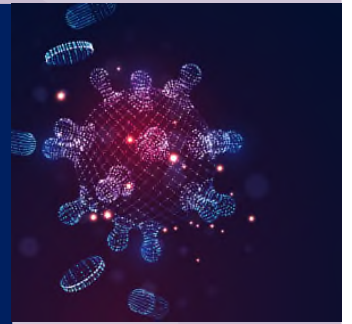
- Eligible employers receive a 50% tax credit on the first \$10,000 of qualified wages (includes qualified health care expenses)
 - Partially or fully suspended operations due to an order
 - Significant decline (50%) in gross receipts from same quarter of prior year
- Applies to wages after March 12th through December 31st, 2020



Tax Credits

Families First Coronavirus Response Act (FFCRA)

- Emergency Paid Sick Leave Act (EPSLA)
- Emergency Family and Medical Leave Expansion Act (EFMLEA)



Tax Credits

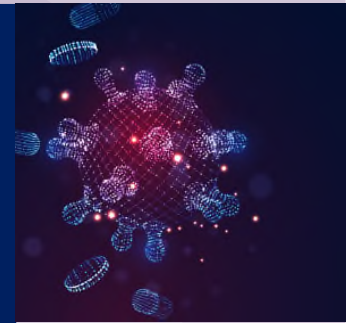
FFCRA intermittent leave:

- Teleworkers: Allowed, if employer agrees
- In-person workers: Not allowed, *except* for care for a child whose school or place of care is closed, or childcare provider is unavailable (and, again, if employer agrees)



Tax Credits

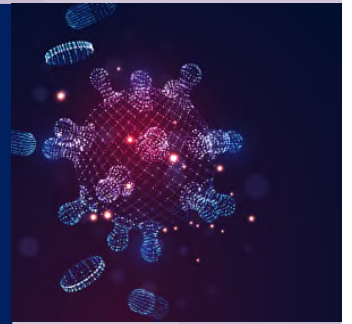
- Employers need to obtain documentation to substantiate these tax credits
- Written request for any type of FFCRA leave must include:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - A statement that the employee is unable to work, including by means of telework, for such reason.



Loans

CARES Act Paycheck Protection Program

- Applications are closed as of April 16 due to lack of funds
- This week, Congress passed a relief package that would allocate another \$310 billion to the program
- Funds are expected to go quickly



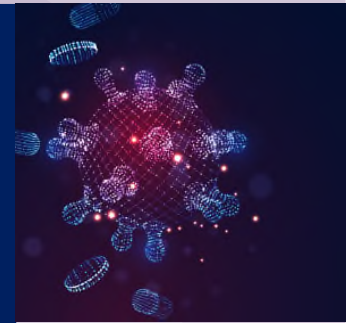
Strategies and Pitfalls for Layoffs



Temporary Layoffs/Leave

Employee communications

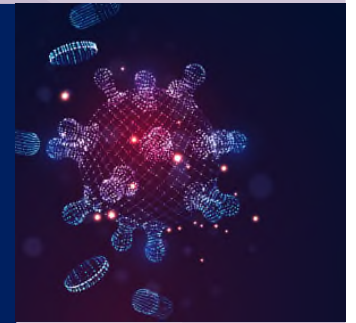
- Avoid creating a contractual obligation to return employees to work on a specific date
- Tell employees how to apply for unemployment benefits
- Tell employees who would otherwise be able to telework that they may not work during the layoff
- Ensure employees' contact information is up to date
- Provide COBRA notices if necessary



Temporary Layoffs/Leave

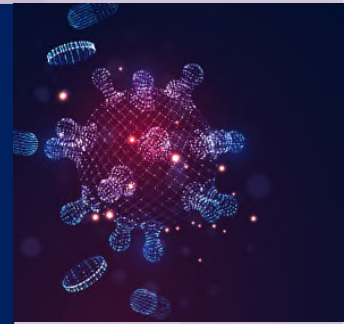
Benefit continuation

- If the employee's temporary layoff or leave is due to a slowdown, continued health insurance coverage depends on leave policies, plan documents, CBA, or past practices
 - If insured, changes to coverage continuation must be approved by the insurance provider
 - If self-insured, changes should be vetted with the plan administrator and stop-loss carrier, and then formally adopted as a plan amendment
- If an employee's leave is FMLA-protected, the employee is entitled to continued health insurance coverage
 - Also true for EFMLEA leave to care for a child whose school or child care is closed or unavailable due to COVID-19 under the FFCRA



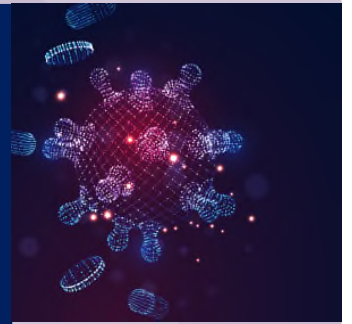
Permanent Layoffs

- Transitions in products and services may require a different workforce
- Restructure workforce to reflect new market realities
 - More online sales may mean fewer retail workers
 - More teleworking may mean fewer office support workers



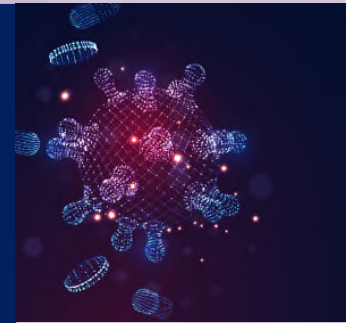
WARN Act

- Requires 60 days advance written notice of a plant closing or mass layoff to affected workers, their union, the state dislocated worker unit, and the local government
- Applies to employers with 100+ employees, excluding employees who have worked <6 of the last 12 months and employees who average <20 hours a week



WARN Act

- Plant closing: Site shutdown that will result in employment loss (termination, layoff of 6+ months, or 50%+ hours reduction in each of 6 months) for 50+ employees during any 30-day period
- Mass layoff: Employment loss at a worksite during any 30-day period for 500+ employees, or for 50-499 employees if they make up 33%+ of the workforce
- Exceptions to 60-day notice period: Faltering company, unforeseeable business circumstances, natural disaster



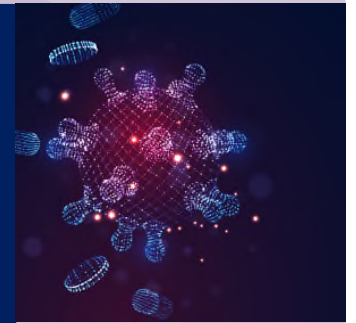
Avoiding Discrimination & Retaliation Clams

- Consider asking for volunteers
- Involuntary layoff decisions should be documented and based on legitimate business reasons (e.g., seniority, skill sets, well-documented performance and/or disciplinary issues)
- Involve multiple decision-makers to enhance neutrality



Avoiding Discrimination & Retaliation Clams

- Perform a risk assessment
 - Disproportionate effect on older workers, or workers of one race, sex, or other protected characteristic?
 - Anyone who recently engaged in protected activity, e.g., complained about allegedly unsafe working conditions, or took EFMLEA leave?
 - Anyone who is staying home under EO 2020-36 because they (or someone they had close contact with) tested positive for or displayed any principal symptoms of COVID-19



Avoiding Discrimination & Retaliation Clams

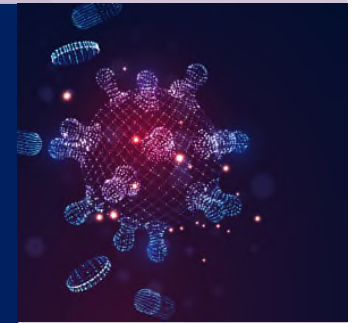
- If offering severance pay, consider having employees sign a release
 - Typically for permanent rather than temporary layoffs
 - OWBPA requires that, for any group layoff, employees who are 40 or older be given:
 - 45 days to consider the release plus 7 days to revoke after signing
 - A list of the job classification or unit and age of all individuals selected for layoff, along with the ages of employees in the same job classification or unit that were not selected for layoff



Unemployment

CARES Act Unemployment Overview

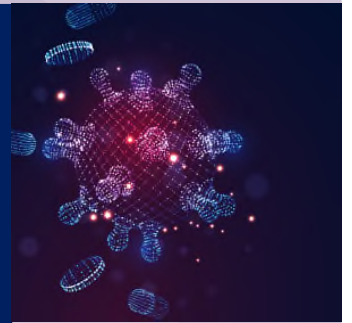
- **Pandemic Unemployment Assistance (PUA)**
 - Expands unemployment eligibility to certain individuals who otherwise do not qualify for unemployment and are unemployed or unable to work for a specified COVID-19 related reason
- **Federal Pandemic Unemployment Compensation (FPUC)**
 - Provides an additional \$600/week through July 31st to individuals who qualify for a regular unemployment program or Pandemic Unemployment Assistance
- **Pandemic Emergency Unemployment Compensation (PEUC)**
 - Provides eligible individuals with up to 13 additional weeks of benefits if they have exhausted regular unemployment and meet certain conditions.



Unemployment

Pandemic Unemployment Assistance (PUA)

- Expands unemployment to include self-employed individuals, gig-economy workers, and others who are otherwise ineligible for unemployment and are unemployed or partially unemployed for specified COVID-19 related reasons
- Governor Whitmer announced an agreement with the federal government to obtain these funds on March 30th
- The Michigan Unemployment Insurance Agency began accepting applications for newly-eligible individuals on April 13th

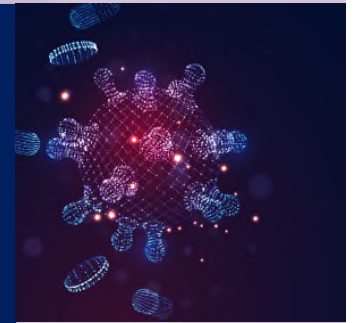


Unemployment

Pandemic Unemployment Assistance (PUA)

“Covered individuals”

- Unemployed or partially unemployed for a reason directly related to COVID-19
 - The individual has been diagnosed or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis
 - A member of the individual’s household has been diagnosed
 - The individual is caring for a household member who has been diagnosed



Unemployment

Pandemic Unemployment Assistance (PUA)

“Covered individuals”

- Unemployed or partially unemployed for a reason directly related to COVID-19
 - The individual has primary caregiving responsibility for a child whose school or daycare is closed as a result of COVID-19
 - The individual is unable to reach their place of employment because of a quarantine order or because they were advised by a health care provider to self quarantine
 - The individual was scheduled to commence employment but does not have a job or is unable to reach that job as a direct result of COVID-19

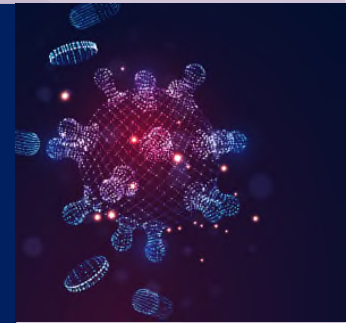


Unemployment

Pandemic Unemployment Assistance (PUA)

“Covered individuals”

- Unemployed or partially unemployed for a reason directly related to COVID-19
 - The individual has become the major breadwinner or support for a household because the head of household has died as a direct result of COVID-19
 - The individual has to quit his or her job as a direct result of COVID-19
 - The individual’s place of employment is closed as a direct result of COVID-19
 - Any additional criteria established by the Secretary of Labor

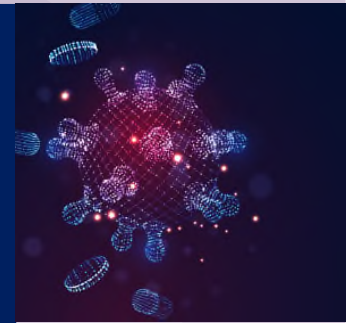


Unemployment

Pandemic Unemployment Assistance (PUA)

“Covered individuals”

- Does NOT include
 - Individuals who can telework with pay
 - Individuals who are receiving paid sick leave or other paid leave
- Possible exception
 - Individuals who are teleworking with less pay than their customary work week
 - Individuals who are receiving paid sick leave benefits for less than their customary work week



Unemployment

Pandemic Unemployment Assistance (PUA)

Amounts received

- Amount determined using state unemployment scheme or in reference to the Disaster Unemployment Assistance program *plus*
- \$600/week until July 31st (FPUC)

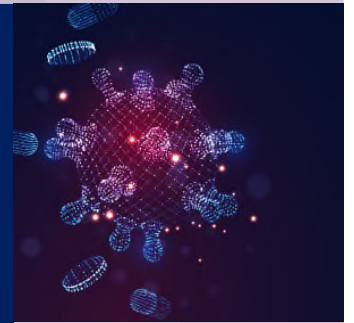


Unemployment

Pandemic Unemployment Assistance (PUA)

Effective dates

- Retroactive to January 27th and available until December 31st, 2020
 - Extra \$600/week (FPUC) only through July 31st
- Some COVID-19 related conditions are time-limited

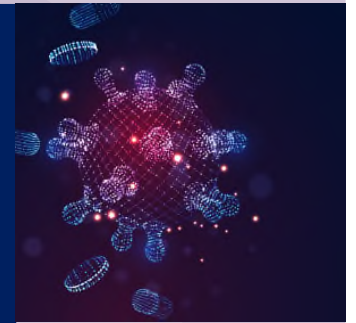


Unemployment

Federal Pandemic Unemployment Compensation (FPUC)

Eligible for the \$600 added benefit through July 31:

- Individuals who qualify for a pre-existing state unemployment program, including Work Share and individuals covered by Executive Order 2020-57
- Individuals who are receiving Pandemic Unemployment Assistance



Unemployment

Pandemic Emergency Unemployment Compensation

- Provides eligible individuals with up to 13 additional weeks of benefits if they have exhausted regular unemployment
- Governor Whitmer had previously extended existing benefits from 20 to 26 weeks, so this makes individuals eligible for up to a total of 39 weeks of state unemployment.
- The 13 additional weeks are subject to conditions, including that recipients be able to work, available for work, and actively seeking work, with flexibility for COVID-related restrictions
- Available until December 31st, 2020



Strategies and Pitfalls for Returning to Work

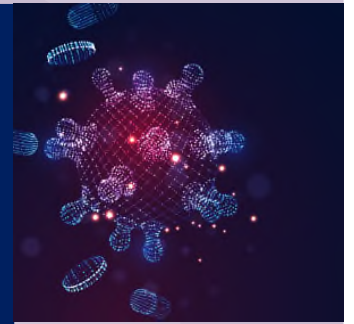


Workforce Health & Safety

Develop a strategy for opening and operating safely in the wake of the COVID-19 pandemic

- Social distancing and risk mitigation protocols
- Create a Preparedness and Response Plan

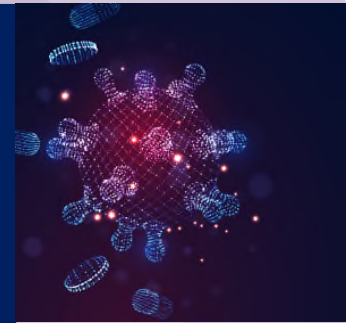
Remind employees of EAP and/or financial counseling services available



Recalling Laid Off Workers

CARES Act Paycheck Protection Program considerations

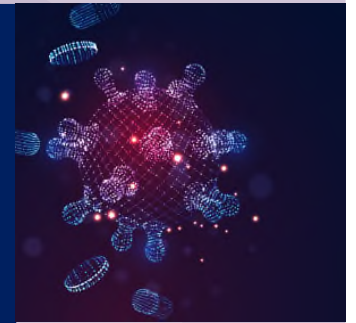
- Be ready to recall laid off employees for PPP loan forgiveness:
 - (1) Must maintain average monthly FTEs during the 8 weeks after loan issuance as compared to either January 1, 2020 to February 29, 2020, or February 15, 2019 to June 30, 2019
 - (2) Must spend at least 75% of the loan proceeds on payroll
- Employees can be paid even if they are not onsite (e.g., through some form of PTO) once you obtain the loan



Recalling Laid Off Workers

Employee communications

- Inform them of expected RTW date (but still subject to change)
- Inform them of social distancing and risk mitigation protocols
- Encourage them to communicate any obstacles to returning to work
 - May be eligible for paid leave or unemployment benefits for COVID-19 related reasons



Recalling Laid Off Workers

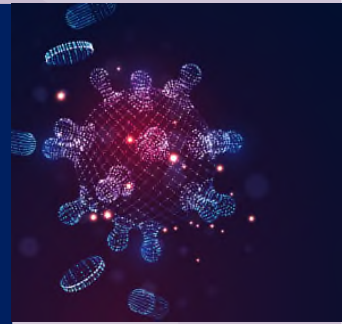
Employee communications

- Consider informing them of consequences of simply choosing not to return to work without good reason
 - Ineligible for unemployment benefits, including additional \$600 (FPUC), which is only available through July anyhow
 - Will communicate availability of work to unemployment agency
 - Penalties for fraud
 - Whether failure to return will be treated as a voluntary resignation
 - No continuation of health insurance coverage other than COBRA
 - Whether voluntary resignations will be ineligible for rehire



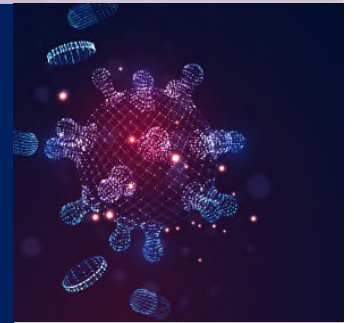
Scheduling

- Consider significantly reduced schedule or Work Share program
- Partially unemployed and Work Share employees that qualify for state unemployment benefits should also qualify for an additional \$600 (FPUC) through July



Incentivizing with Hazard Pay

- Define and document terms of hazard pay
 - Time period during which hazard pay will be earned
 - Jobs eligible for hazard pay
 - Amount and structure of hazard pay, e.g., bonus or increased pay
 - Remember FLSA considerations
- Review compliance with applicable laws/orders such as FMLA and EO 2020-36
 - Employees need not earn hazard pay for any COVID-19 related and other protected absences but such absences should not be wholly disqualifying



Q&A



COVID-19

How long can an employee furlough last?

If an employee has been out on FMLA leave that predates the COVID-19 pandemic, and there is no work available for that employee when his/her FMLA leave ends, can he/she be laid off?

Can an employer lay off employees and then recall them before payment of the CARES Act PPP loan and still get loan forgiveness?

Does an employer need to recall employees based on certain criteria such as seniority, need, or expertise?

Can an employer recall an employee at reduced hours so that they are still eligible for unemployment and the \$600/week of federal benefits?

If an employer would prefer not to recall certain employees who have been laid off temporarily, what is the safest way to end their employment?

Is someone eligible for unemployment if they leave voluntarily for a reason related to COVID-19?

Upcoming Webinars

Register at wnj.com

April 27: Labor and Employment Update: Returning Employees to Work After COVID-19

April 29: Labor and Employment Update: Preparing the Facility for Operations After COVID-19

April 29: What's Next? How Landlords, Tenants and Lenders are Navigating the COVID-19 Pandemic

April 30: Insurance Coverage for Emerging COVID-19 Claims Against Businesses

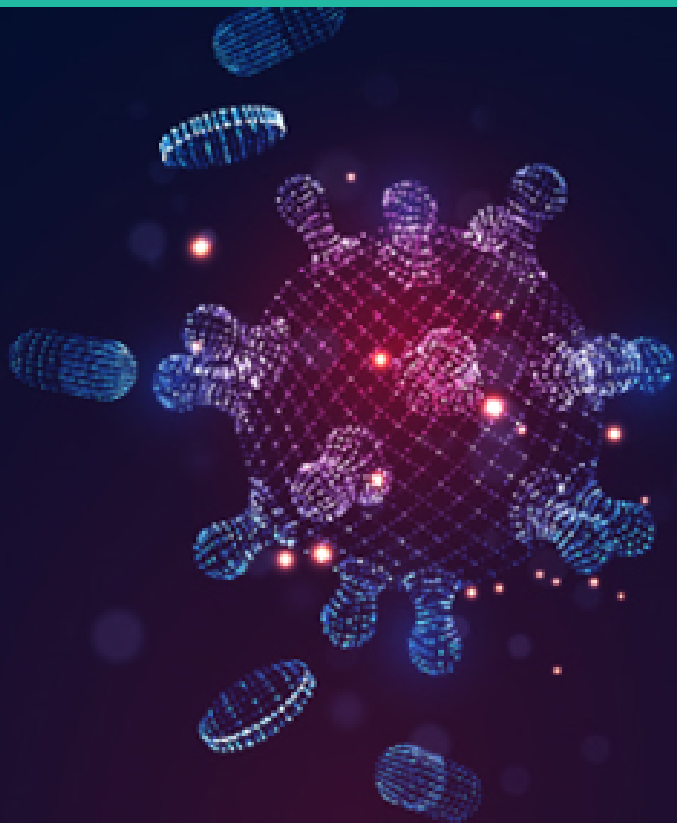
May 1: Business Update: Managing Your Supply Chains After COVID-19

May 12: Gaining Access to Government Data During COVID-19 with FOIA and OMA

Email covid@wnj.com to subscribe to future eAlerts and webinars.

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Thank You For Attending



COVID-19

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