

Welcome to Pillsbury's Industry Insights: Retail

June 4, 2020

The Pillsbury logo is displayed in a white rectangular box in the bottom right corner. The word "pillsbury" is written in a lowercase, sans-serif font, with the letters in a reddish-brown color.

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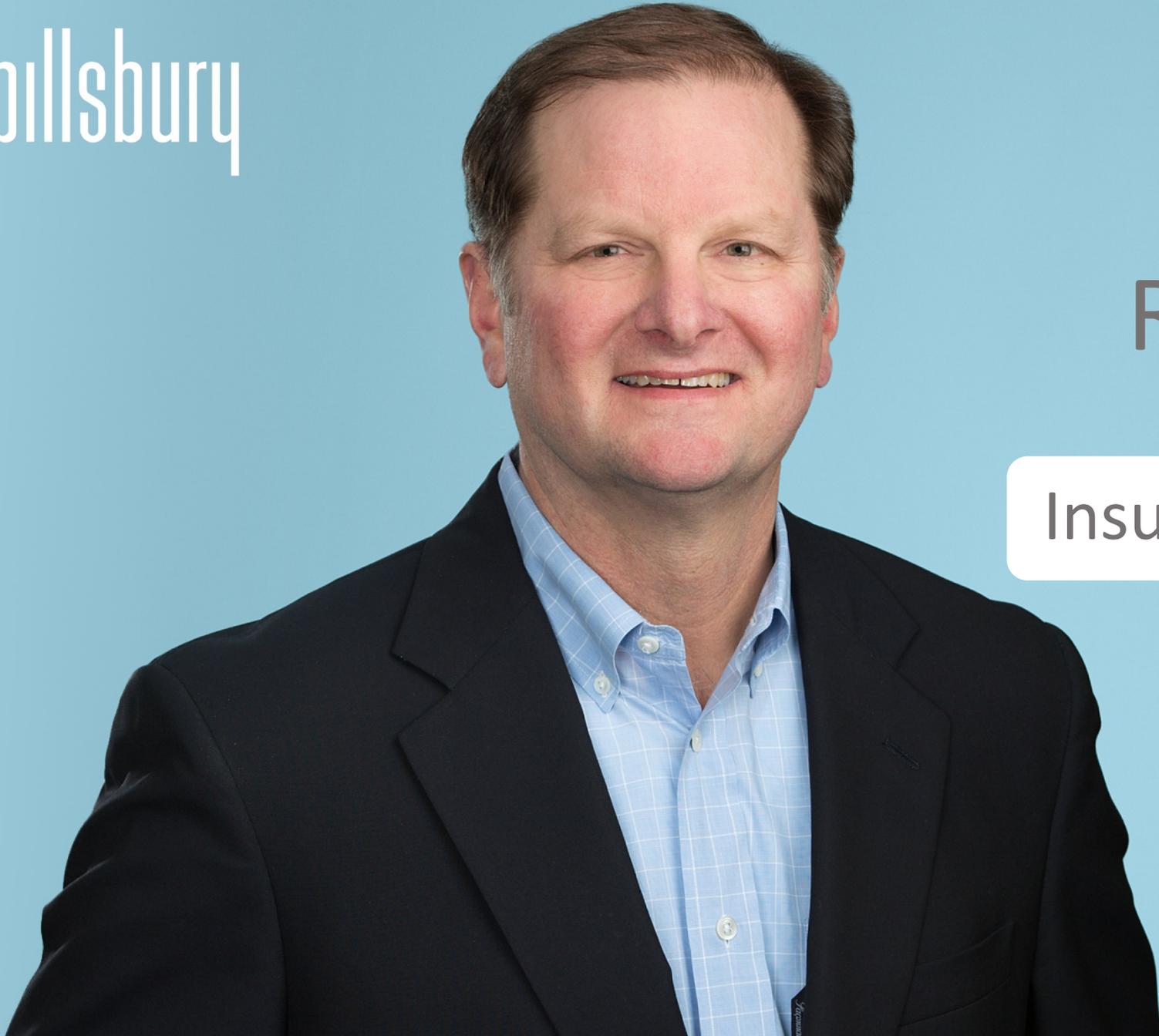


Agenda

- Insurance Considerations
 - Business interruption
 - Curfew closures
- Employment Considerations
 - Re-hiring/return from furlough
 - Safety
 - Anti-discrimination/accommodation
 - Wage and hour compliance

- Benefits and Tax Considerations
 - Returning from furloughs
 - Health, welfare and 401(k) plan options and considerations
 - Retention tax credits
- Privacy Considerations
 - Customer interaction
 - Cybersecurity concerns

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Robert Wallan

Partner

Insurance Considerations

Business Interruption and Civil Authority Coverage May Help Recover on Losses

Insurance Coverage for Curfew, Theft and Vandalism

Civil Authority Coverage

- What is it?
- What are the limitations?
 - Waiting periods
 - Sublimits
 - Time limits
 - Mileage limits for property damage

Business Interrupted by Curfew Orders?

- Comply with the law and stay safe
- Immediately notify broker/give notice
- Determine whether nearby property was damaged
- Document nearby damage—take pictures/identify locations

Theft and Vandalism

- Give notice
- Preserve and protect
- Document losses

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Employment Considerations

Employment Issues

- **Returning Workers on Furlough/Layoff**
 - Risk of discrimination/retaliation claims based on selection
 - CBA's/ local ordinances requiring bringing back by seniority (e.g. LA)
 - WARN issues if longer than 6 months or turning furloughs into layoffs

Employment Issues — Safety

- Follow CDC/OSHA guidance and state resources
- Review and modify access, layouts, equipment, supplies, signage and schedules
- Testing/prescreening
- Checklist or action plan for handling symptomatic employees in the workplace and communications protocols

Employment Issues

- **Wage and Hour Issues**
 - Reimbursable expenses (PPE, remote work, etc.)
 - Outside Sales? Commission Sales?
 - Temporary changes in duties effect on primary duty analysis
- **Paid Sick Leave**
 - Families First Coronavirus Response Act
 - State and Local Paid Sick Leave Ordinances
 - Legal patchwork; as always, most protective wins

Employment Issues — Discrimination Claims

- Consider how to deal with employees who want to return to work despite being high risk/family obligation
 - Age discrimination issues
 - Duty to accommodate disabilities
 - Gender discrimination due to childcare responsibilities

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Benefits & Tax Considerations

401(k) Plan—Legislation

- **COVID-19 Related Key Provisions of:**
 - the Setting Every Community Up for Retirement Enhancement (SECURE) Act; and
 - the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

401(k) Plan – Planning Opportunities & Requirements

- **Special Plan Distribution Options:**
 - In-service withdrawals for qualified individuals (impacted by COVID-19) of up to of \$100,000 in 2020 without income tax penalties
 - Hardship distributions expanded for COVID-19-related events
 - Waiver of Required Minimum Distributions (RMDs start at age 72)
- **Special Plan Loan Opportunities:**
 - Qualified Individuals can borrow up to \$100,000 or 100% of their accounts
 - Qualified Individuals can take an extended time period to repay outstanding loans
- **Newly-Issued IRS Guidance for Increased Flexibility Regarding Spousal Consent**

401(k) Plan – Cost Saving Measures

- Reduce, Suspend or Discontinue Employer Matching and/or Profit-Sharing Contributions:
 - Governance and Plan Amendment Requirements
 - Timing:
 - Communicate to participants with sufficient notice such that they can “opt-out”
 - Special notice requirements for safe harbor program – 30-day advance notice
 - Form and Content of Notice

Health & Welfare Plan – Planning Opportunities & Requirements

- COVID-19 Related Medical Testing and Treatment Required:
 - Cost sharing amounts automatically waived for HDHPs
 - Telehealth/remote services covered outside the HDHPs with lowered costs
- Extended Benefit Program Deadlines (suspension of deadline during “outbreak period”):
 - COBRA: Participant-initiated Qualifying event notice, coverage election and payment of premiums
 - Claims: Filing deadlines for claims and appeals
 - HIPAA: Special enrollment
 - Other required ERISA Notices
- Note: “Outbreak period” that is disregarded for the above purposes has not yet been fully determined. It starts March 1, 2020 and lasts until 60-days after the end of the National Emergency or such other period as later announced.

Health & Welfare Plan – Planning Opportunities & Requirements

- **Health Coverage and Spending Accounts:**
 - Not limited to individuals affected by the pandemic
 - Permits mid-year changes without a “change in status”
 - Health Plan: Enroll, revoke (if other coverage with attestation) or change level of plan coverage
 - FSAs and HRAs: Enroll, revoke, decrease or increase an existing election
 - Health FSAs: Can adopt grace period (for 2020 only) and/or carryover of up to \$550
 - Plan Sponsor has design flexibility:
 - All changes must be prospective
 - Timing: Prospective and effective for 2020—can apply starting January 1st if already implemented and need only apply for period specified (e.g., month of June)
 - Amendments: Generally required, but not until December 31, 2021—provided communicated to participants
 - Overspending: Plan sponsor can prohibit “overspending” such that employees can only revoke/change Health FSA elections when benefits have not yet been received

Compensation Planning Considerations

- Reduction or deferral of salary or wages
 - Employee communication
 - Executive employment agreements and constructive termination triggers
 - Section 409A tax requirements
 - Federal and state wage and hour requirements
- Adjustment of goals for 2020 cash incentive awards
 - Effects of COVID-19 on business and timing for changes
 - Publicly-traded company considerations
 - Absolute versus relative performance metrics

Compensation Planning Considerations

- Changes to deferral elections under deferred compensation plans
 - Amounts deferred or timing of distribution
 - Section 409A tax requirements
- Treatment of equity awards
 - Continued service and vesting during furloughs
 - Decline in stock price and size of awards
 - Additional grants and types of awards – options vs full value awards (RSUs)
 - Share reserves under equity plans
 - Underwater option repricings and exchanges
 - Private company considerations
 - Public company considerations

Employee Retention Tax Credit

- Refundable payroll tax credit equal to 50% of up to \$10,000 in qualified wages paid by employers during the COVID-19 crisis
 - Applies to wages paid between 3/13/20 and 12/31/20
 - Maximum credit of \$5,000 per employee
- **Not available** to employers that receive a **paycheck protection program loan** under the CARES Act
- Available to employers that carry on a trade or business during 2020, including tax-exempt entities, whose:
 - Operations were fully or partially suspended due to a COVID-19 related “shut-down order” during a calendar quarter, or
 - Gross receipts declined during a calendar quarter by more than 50% when compared to the same quarter in the previous year

Employee Retention Tax Credit

- Definition of “**qualified wages**” depends, in part, on the average number of full-time employees employed on average during 2019, as determined under the Affordable Care Act on a controlled group basis
 - If had **more than 100 employees** during 2019, “qualified wages” are limited to wages paid to employees **when they are not providing services** due to shut-down or reduction in gross receipts
 - If had **100 or fewer employees** during 2019, “qualified wages” includes **all wages paid to any employees** (whether open for business or subject to a shut-down) during the shut-down or reduction in gross receipts
- Qualified wages include qualified health plan expenses paid by employer or employee on pre-tax basis
- Qualified wages exclude any amounts for which the employer receives the COVID-19 leave tax credits

Employee Retention Tax Credit - Planning Considerations

- Furloughed employees
 - Eligible employer may take credit with respect to pre-tax health plan costs paid for employees, even if not paying other wages during furlough period
 - Allocable health plan costs determined on pro-rata basis among covered employees
 - If greater than 100 employees, costs must relate to periods not working
 - If 100 employees or less, costs may relate to periods working or not working
- Process to claim credit
 - Credit allowed against employer portion of social security tax
 - Eligible employers may claim credit on quarterly employment tax return
 - May claim credit in advance by reducing federal employment tax deposits
 - To extent employment tax deposits are not sufficient, file Form 7200 with IRS for advance refund

Opportunity to Defer Employment Taxes

- The CARES Act provides that all employers and self-employed individuals may defer payment of the employer share of the Social Security tax owed on wages paid for the period beginning on March 27, 2020 ending on December 31, 2020
- Deferred taxes are due in two installments:
 - 50% by December 31, 2021, and
 - 50% by December 31, 2022.
- This payroll tax deferral opportunity is available to all employers without regard to size or industry and with no requirement to show any specific COVID-19-related impact
- Employers that receive a loan under the Paycheck Protection Program may not continue to defer employer's share of Social Security tax due after the employer receives a decision from the lender that the PPP loan is forgiven under the CARES Act.
 - Amounts previously deferred may still be deposited by 12/31/21 and 12/31/22
 - Recent bill introduced by House removes this restriction



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Privacy Considerations

The Balancing Act

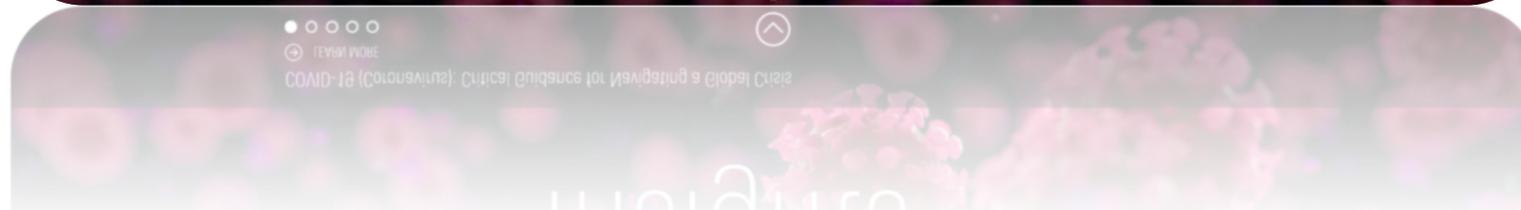
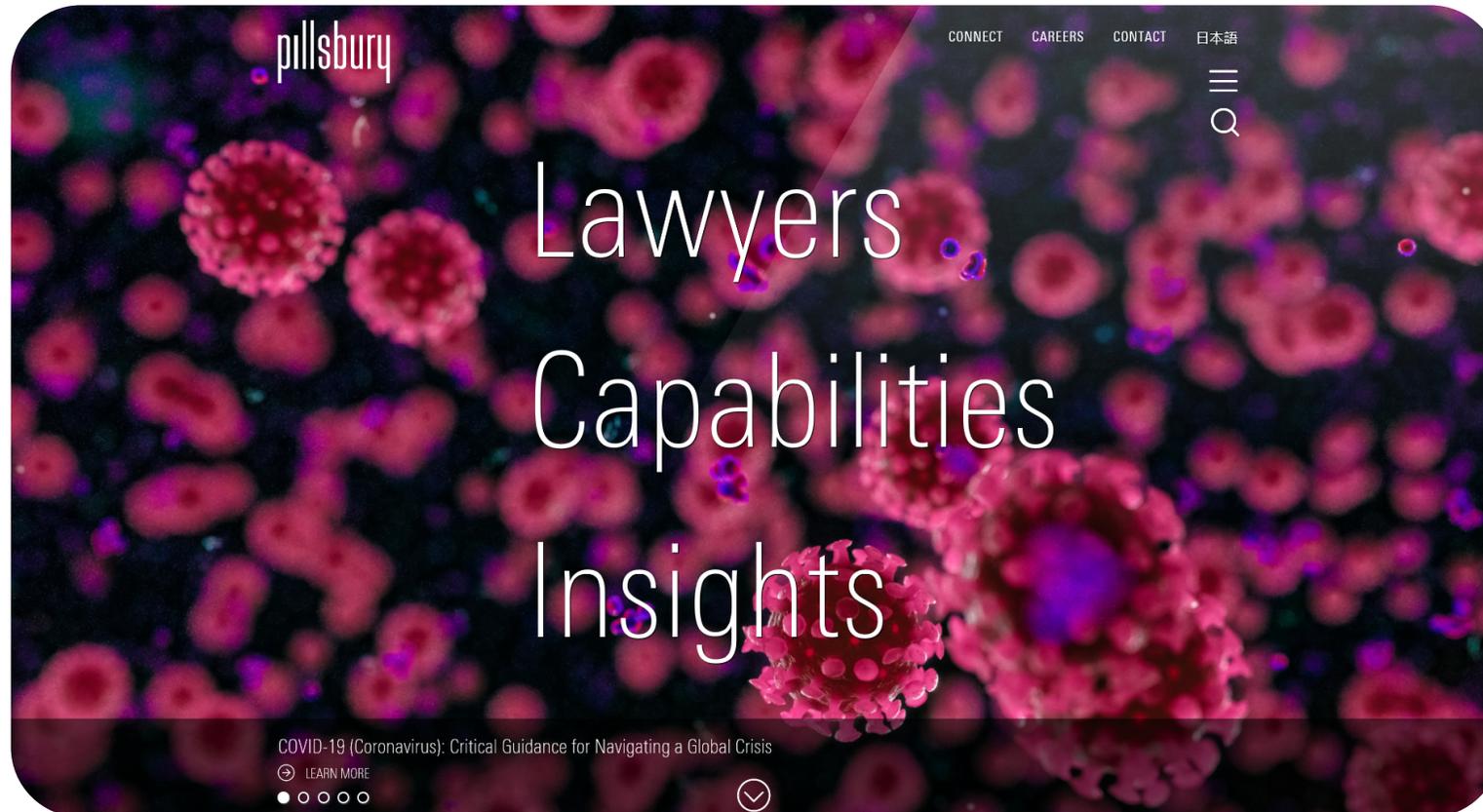
Safety

- Screening/ testing
- Distance requirements/enforcement
- Tracking/tracing
- Local and State guidelines

Privacy

- Disclosures about monitoring
- Protecting health information
- Security
- Geolocation

Please Visit Pillsbury's COVID-19 (Coronavirus)
Resource Center @ www.pillsburylaw.com



Q&A Session



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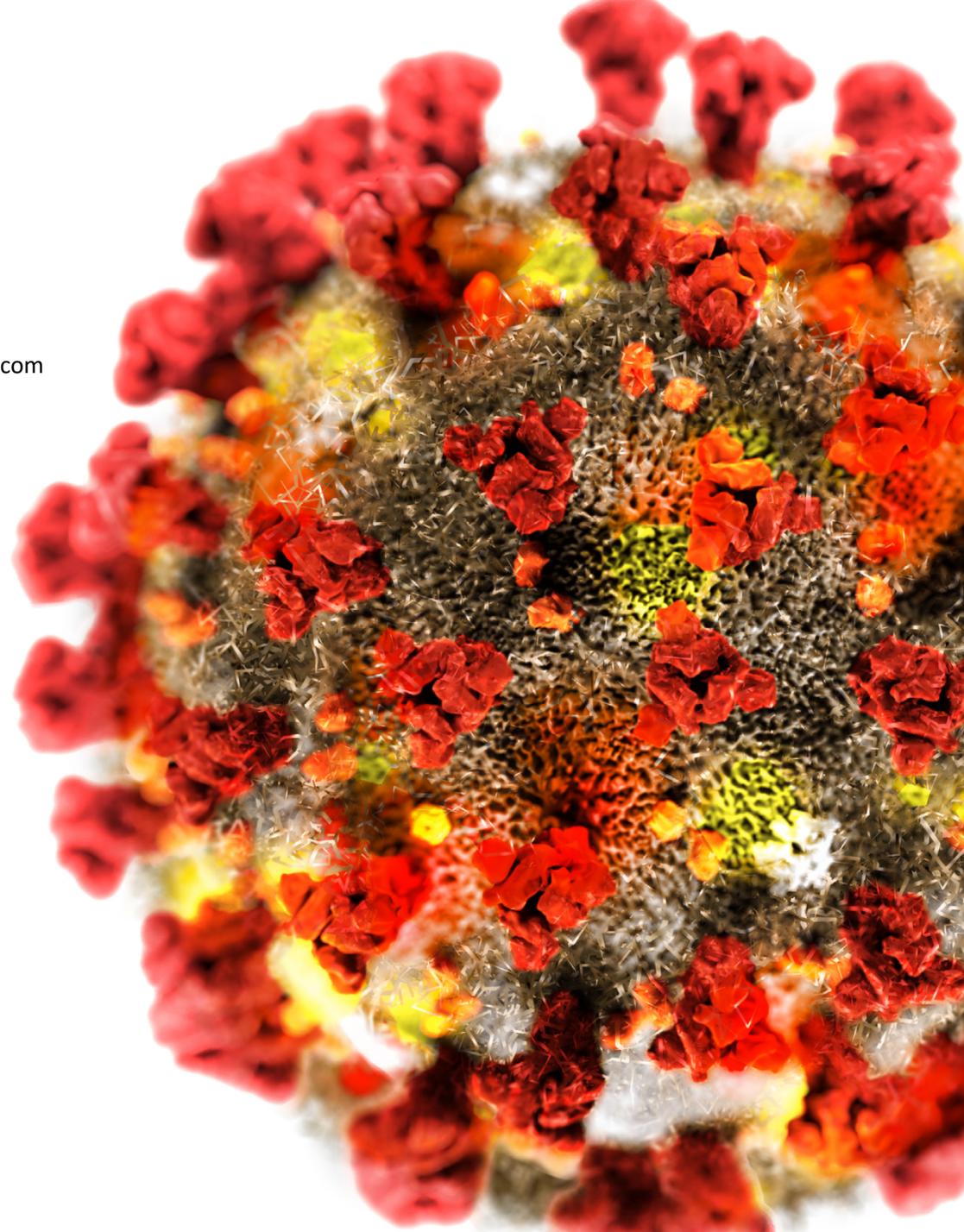
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