

# Getting Back to Work After the Coronavirus Shutdown: *Best Practices and Legal Risks*

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DAVID BARRON, MATT CLYDE, JEREMY GLENN, AARON HOLT, BETHANY SALVATORE, WALTER STELLA AND JENNIFER WILLIAMS.



Chicago  
Jeremy Glenn



Pittsburgh  
Bethany Salvatore



# Our Team

San  
Francisco  
Walter Stella



Pittsburgh  
Matt Clyde



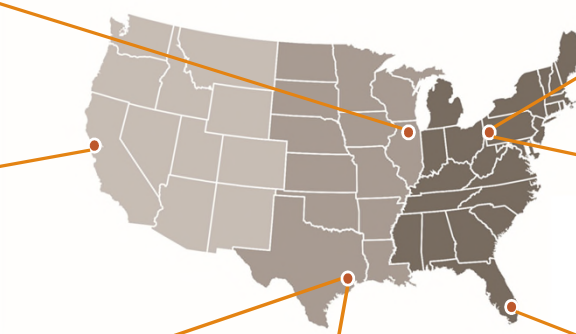
Houston  
Aaron Holt



Houston  
David Barron



Miami  
Jennifer Williams



New Federal Guidance – April 16, 2020



**GUIDELINES**

**OPENING UP**

**AMERICA AGAIN**



# Guidelines For All Phases - Employers

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Develop and implement appropriate policies, in accordance with federal, state, and local regulations and guidance, and informed by industry best practices, regarding:

- ✓ Social distancing and protective equipment
- ✓ Temperature checks
- ✓ Sanitation
- ✓ Use and disinfection of common and high-traffic areas
- ✓ Business travel

Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider.

Develop and implement policies and procedures for workforce contact tracing following employee COVID-test.

# Phase One – Employers

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- Continue to encourage **TELEWORK**, whenever possible and feasible with business operations.
- If possible, **RETURN TO WORK IN PHASES**.
- Close **COMMON AREAS** where personnel are likely to congregate and interact, or enforce strict social distancing protocols.
- Minimize **NON-ESSENTIAL TRAVEL** and adhere to CDC guidelines regarding isolation following travel.
- **Strongly consider SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION**.

## Phase Two – Employers

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- Continue to **ENCOURAGE TELEWORK**, whenever possible and feasible with business operations.
- Close **COMMON AREAS** where personnel are likely to congregate and interact, or enforce moderate social distancing protocols.
- Strongly consider **SPECIAL ACCOMMODATIONS** for personnel who are members of a **VULNERABLE POPULATION**.

## Phase Three – Employers

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- Resume **UNRESTRICTED STAFFING** of worksites.

## Recommended Timeline

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"We did not put a timeline on any of the phases. We want the governors — with the data that they have, community by community, to be setting up those timelines."

— **Dr. Deborah Birx**

"You're going to call your own shots."

— **Donald Trump**



# Overview of Webinar Topics

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1. Planning to Reopen your Company
  - *Best Practices for Recall of Furloughed Employees*
  - *Health Screening and Testing*
  - *Employee Benefits Considerations*
  - *Safety Practices and PPE*
2. Managing your Workforce During Coronavirus
  - *New Risks of Discrimination Claims in Hiring/Firing*
  - *Reasonable Accommodation Requests*
  - *Teleworking & Cybersecurity*
3. Legal Update
  - *CARES and FFCRA*
  - *State Laws*



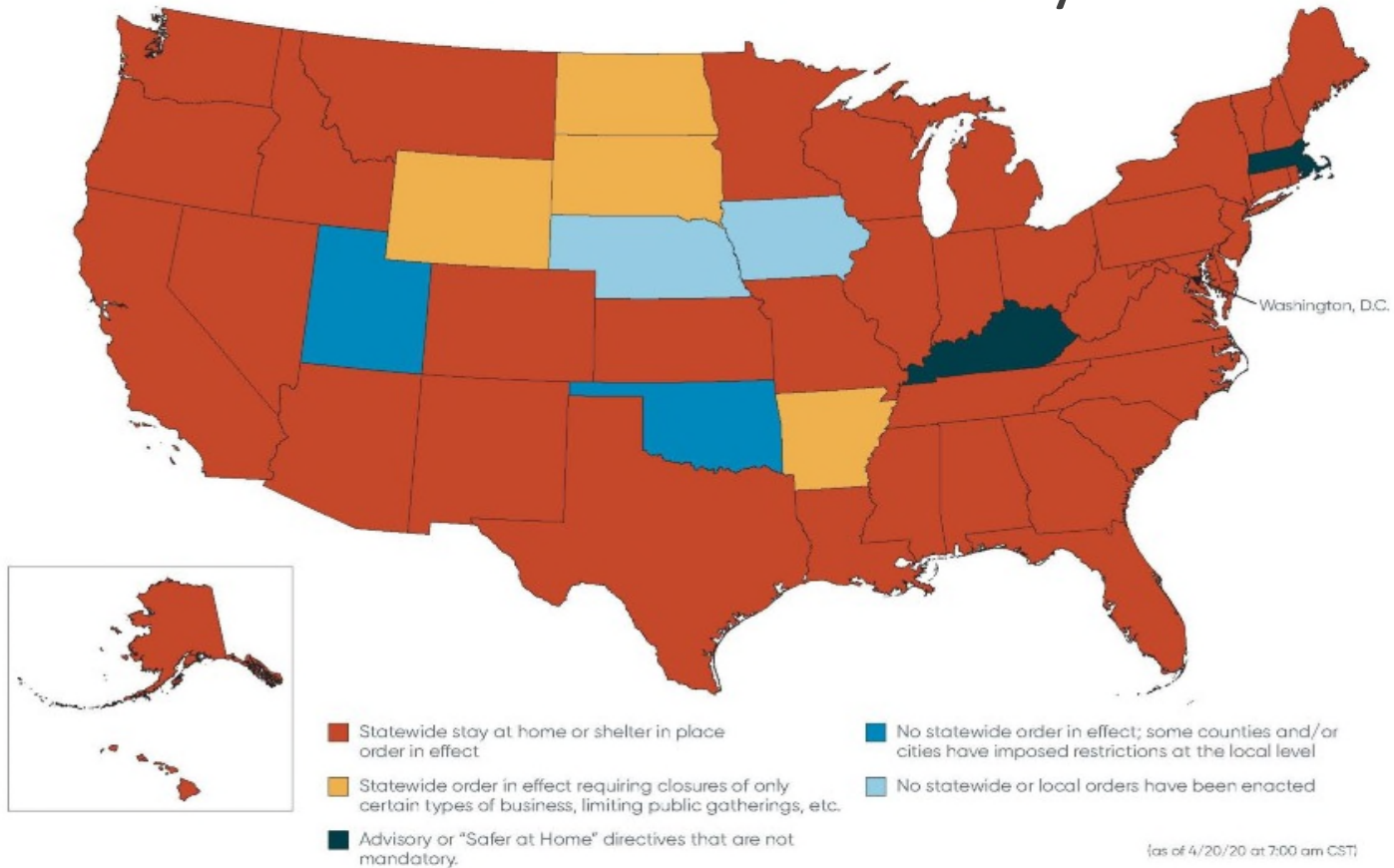
# Planning to Reopen: *Recalling Employees*

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BETHANY SALVATORE



# Current Restrictions By State



# Planning to Reopen: *Who to Bring Back First?*

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- Consider structuring a phased ramp-up
  - Limit COVID-19 exposure/comply with state social distancing requirements; and
  - trouble shoot workforce and operational problems
- Document recall selection criteria in written plan
- Identify essential business functions and essential employees
  - Nature and function of the job;
  - Ability to return to work safely/ability to continue to telework remotely
  - Employee performance-related considerations
  - Non-discriminatory criteria

# Planning to Reopen: *Recall Communications*

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- **Timing Considerations**
  - How much advance notice for recall
  - Written acknowledgment from employees of intent to return
  - Deadlines for return to work
    - Grace Period or
    - Automatic Voluntary Resignation/Job Abandonment
- **Communication Details**
  - Discuss PPE requirements upon return
  - Address rolling start/stop/break times
  - Explain the company's COVID-19 safety measures/policies



## Planning to Reopen: *Recall Obstacles*

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- COVID-19 Fears
- Unemployment Compensation Benefits
  - Federal Pandemic Unemployment Compensation (FPUC)
    - Additional \$600/week to workers eligible under existing state UC programs from March 27 – July 31, 2020
  - Pandemic Unemployment Assistance (PUA) program
    - UC benefits to workers for those not otherwise eligible under their state UC program for 39 weeks, ending on December 31, 2020



## Planning to Reopen: *Reporting Recall Refusals*

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- Should Employer Report Recall Refusals?
  - Morale issues
  - Short reporting deadlines
    - *e.g.* Pennsylvania UC law requires that employers notify the Department of recall refusals within seven days from when the offer is made
      - [https://www.uc.pa.gov/Documents/UC\\_Forms/UC-1921%20Interactive.pdf](https://www.uc.pa.gov/Documents/UC_Forms/UC-1921%20Interactive.pdf)



# Planning to Reopen: *Recall Refusal Ramifications*

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- Potential Recall Refusal Consequences
  - Loss of Job Security
  - Loss of Seniority
  - Loss of Benefits
  - Ineligible for Unemployment Compensation





Planning to Reopen:  
*Health Screening and Testing*

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# Planning to Reopen: *Health Considerations*

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EEO laws apply during the COVID-19 pandemic, but do not interfere with or prevent employers from following CDC or state/local public health guidance

- The CDC and public health authorities have acknowledged community spread of COVID-19, and have determined that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace.

CDC Guidance: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

# Planning to Reopen: *Health Screening and Testing*

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Given the serious nature of COVID-19, and its “direct threat” status, the EEOC, in partnership with the CDC, has determined that employers may:

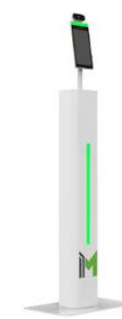
1. Measure employees’ body temperature
  - Results of any medical screening is a protected health record subject to confidentiality requirements if recorded
2. Establish COVID Protocols
  - Send home an employee with COVID-19 or symptoms associated with it;
  - Require employees to report symptoms or travel history for themselves and anyone living with them.
3. Require Medical Certifications
  - Can require, but consider practical implications and testing availability

# Planning to Reopen: *Temperature Check Considerations*

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- Mandatory or voluntary
- Company or Third-Party Scanner
  - Workers' Compensation Considerations
  - Ensure adequate training
- Compensability of Waiting Time (Non-Exempt)
- State-law requirements (*e.g.* PA Department of Health Order)

## Available Sizes



Pedestal with LED



Pedestal without LED



Battery Powered

# Planning to Reopen: *Temperature Check Best Practices*

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- Provide PPE to individual administering check
- Use touchless thermometer/scanner, if available
- Maintain 6-foot distance
- Scan employees, visitors and vendors
- Use CDC 100.4 degree Fahrenheit cutoff
- Scan in private location, if possible
- Keep records confidential
- Be consistent!



# Planning to Reopen: *COVID-19 Symptom Inquiries*

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- During the pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of COVID-19 but should not inquire about symptoms unrelated to COVID-19
- Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.
  - For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, sore throat, new loss of smell or taste, as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting
- Employees should be sent home if they exhibit COVID-19 symptoms at work or instructed to stay home if the employee calls and reports COVID-19 symptoms from home
  - Once a positive COVID-19 case is reported, employers should follow CDC and OSHA guidance as well as applicable state and local orders

# Planning to Reopen: *Records of Health Screening and Testing*



## OSHA Recordkeeping Requirements

- 29 CFR § 1904 exceptions due to COVID-19
- <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

## EEOC

- EEOC allows employers to maintain a log of temperature check results but must maintain confidentiality of this information, other than disclosing the employee to a public health agency when the company learns the employee has COVID-19
- [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

## Privacy

- Medical records should be maintained confidentially in an employment file separate from the personnel file

# Planning to Reopen: *Employee Benefits*

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MATT CLYDE





# Planning to Reopen: *Health and Welfare Plan Considerations*

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- Should employers continue prior coverage elections or allow new elections?
- Is coverage effective immediately upon return?
  - Consider insurance carrier / stop loss carrier probation period rules before promising employees 1<sup>st</sup> day coverage.
  - If coverage is offered through a union-administered health fund, the fund rules will govern.
- Did the Company promise coverage for employees while furloughed/laid-off?
  - Consider whether employees owe “catch-up” contributions.
  - Confirm whether insurance carrier/stop-loss carrier will provide coverage.
  - Confirm whether plan documents need to be amended to reflect benefits coverage.
- Flexible Spending Account / Dependent Care Account → does the “use-it-or-lose-it” rule apply or are account balances “restored” upon rehire?
- Will employees get “credit” for prior co-pays and deductibles paid?
- MOST IMPORTANT – CHECK THE PLAN DOCUMENT!

# Planning to Reopen: *Retirement Plan Considerations*

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- **Employee Deferral Elections:** continue prior deferral elections or require new deferral elections?
- Vesting Issues:
  - Consider whether time on leave/furlough/lay-off will affect vesting?
  - Consider whether a partial 401(k) plan termination has occurred because of a 20% or greater reduction in force (partial plan terminations (generally trigger 100% vesting).
- All loan repayments due between March 27, 2020 and December 31, 2020 should be delayed one year.
- **New Optional Hardship Distribution under the CARES Act:**
  - Up to \$100,000 can be withdrawn without 10% early withdrawal penalty by a participant: (i) who is diagnosed with COVID-19; (ii) whose spouse/dependent is diagnosed with COVID-19; or (iii) who experiences adverse financial consequences as a result of being unable to work because of COVID-19.
  - Participants can repay the distribution over 3 years.
  - Plan sponsors can rely on a participant's self-certification that the participant is eligible for a COVID-19 distribution.
  - Plan sponsors are not required to allow COVID-19 distributions.

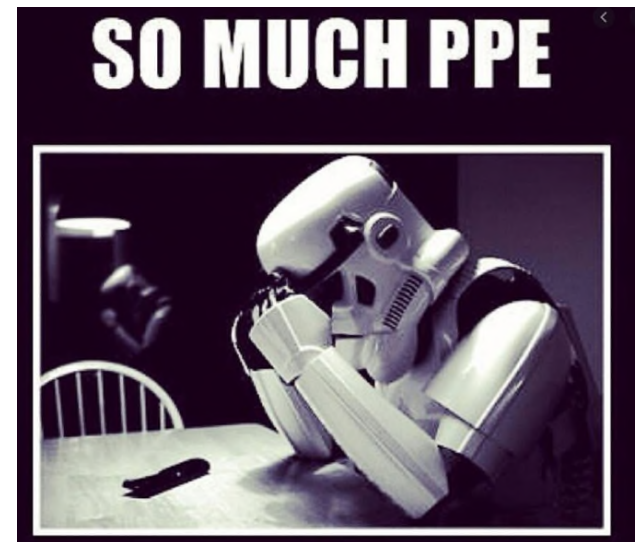
# Planning to Reopen: *Retirement Plan Administration*

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- Employer Contributions for the 2019 Plan Year might be Deferred/Delayed because of extension of tax filing deadline.
- Required Minimum Distributions can be suspended in 2020.
  - The plan document must be amended no later than the last day of the first plan year beginning on or after January 1, 2022
- If COVID-19 distributions are permitted, the plan must be amended to allow the distribution.
  - The plan document must be amended no later than the last day of the first plan year beginning on or after January 1, 2022.

# Planning to Reopen: *Safety Practices and PPE*

WALTER STELLA





# Planning to Reopen: *Safety Practices*

## CDC/OSHA Specific Guidance on Changes to the Workplace

- General Guidance
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
  - <https://www.osha.gov/Publications/OSHA3990.pdf>
- Increase Ventilation rates and external air circulation
- Close communal meeting rooms. Partition workspace to ensure social distance.
- Respiratory Etiquette (*i.e.* handshakes, cough etiquette)
  - CDC Guidance on Coughing & Sneezing ([https://www.cdc.gov/healthywater/hygiene/etiquette/coughing\\_sneezing.html](https://www.cdc.gov/healthywater/hygiene/etiquette/coughing_sneezing.html))
- Intensify janitorial cleaning, especially in common areas (*e.g.* breakrooms, kitchens)
  - CDC Guidance on clearing community areas - <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>
  - EPA Guidance of effective cleaning products - <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2>



# Planning to Reopen: *Safety Practices*

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## CDC/OSHA Recommendation Highlights and Links

- Travel warnings:
  - Level 1: Practice Usual Precautions
  - Level 2: Practice Enhanced Precautions
  - Level 3: Avoid Nonessential Travel
  - CDC Guidance on Travel - <https://wwwnc.cdc.gov/travel>
- Flexible work hours (*e.g.* staggered shifts) and worksites (*e.g.* teleworking)
- Individual Employee Prevention tips
  - CDC Guidance: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>
  - OSHA Guidance: <https://www.osha.gov/Publications/OSHA3989.pdf>



# Planning to Reopen: *PPE*

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## Key Consideration

- Consider whether PPE (masks, gloves, gowns, face shields) are **mandatory** or *optional*?
  - If **mandatory** – will the company provide (or reimburse employees) for them? Are they available?
  - If *optional* – any restrictions on employee created PPE?
  - Note: OSHA considers face masks (not respirators) as “source containment” (to prevent the wearer from spreading the virus) and not PPE (to prevent the wearer from getting the virus).

## Federal Guidance

- CDC’s April 3, 2020 Guidance recommends using cloth face coverings in public.
  - <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>
  - Face covering should:
    - fit snugly but comfortably against the side of the face
    - be secured with ties or ear loops
    - include multiple layers of fabric
    - allow for breathing without restriction
    - be able to be laundered and machine dried without damage or change to shape

# Planning to Reopen: *PPE*

Available at:

<https://www.osha.gov/Publications/OSHA3993.pdf>

- Most American workers will fall in the “low risk” category according to OSHA. For low risk exposure employees, OSHA does not currently recommend a mask (or respirator).
- OSHA considers individuals screening for temperatures to be in the “medium” risk category

## Worker Exposure Risk to COVID-19

### Classifying Worker Exposure to SARS-CoV-2

Worker risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, during an outbreak may depend in part on the industry type and need for contact within 6 feet of people known to have, or suspected of having, COVID-19.

OSHA has divided job tasks into four risk exposure levels, as shown below. Most American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels.

### Occupational Risk Pyramid for COVID-19

#### VERY HIGH EXPOSURE RISK

Jobs with a high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers include:

- Healthcare and morgue workers performing aerosol-generating procedures on or collecting/handling specimens from potentially infectious patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

#### HIGH EXPOSURE RISK

Jobs with a high potential for exposure to known or suspected sources of COVID-19. Workers in this category include:

- Healthcare delivery, healthcare support, medical transport, and mortuary workers exposed to known or suspected COVID-19 patients or bodies of people known to have, or suspected of having, COVID-19 at the time of death.

#### MEDIUM EXPOSURE RISK

Jobs that require frequent/close contact with people who may be infected, but who are not known or suspected patients. Workers in this category include:

- Those who may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings), including individuals returning from locations with widespread COVID-19 transmission.

#### LOWER EXPOSURE RISK (CAUTION)

Jobs that do not require contact with people known to be, or suspected of being, infected.

- Workers in this category have minimal occupational contact with the public and other coworkers.

For more information, see the *Guidance on Preparing Workplaces for COVID-19*.



The four exposure risk levels represent probable distribution of risk.





# Planning to Reopen: *PPE*

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- Can you require an employee to wear a mask?
  - According to the EEOC, Yes. “An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.”
- What if an employee wants to wear a mask?
  - When possible, employers should allow employees to wear masks and should only deny mask use if there is a business necessity or safety reason to deny mask use.
- Should I have a policy?
  - If possible, yes. Given the shortage of N-95 masks, employers should have a policy regarding what masks are allowed or required, whether the employer will pay for the masks, and any other relevant information. OSHA has also stated that employers should “make a good-faith effort to provide and ensure workers use the most appropriate respiratory protection available for the hazards against which workers need to be protected.”

# Planning to Reopen: *PPE*

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- Who pays for this?
  - Some states (California, New York, New Jersey) specifically require employer's to provide essential face coverings at their expense
  - No current guidance from OSHA or DOL regarding face coverings *provided they are used for source containment only*.
  - General PPE standards still mandate that PPE required by the employer be supplied and paid for by the employer (e.g. surgical masks in an operating room).
  
- Who cleans it?
  - Absent state specific rules (e.g. New York's Minimum Wage Order requiring employers to launder uniforms or pay employees a premium to cover cleaning), employers are recommended to add a cleaning stipend or an in-house cleaning program.
  
- OSHA is expected to release new guidance on face masks in the workplace in the coming days.



## Planning to Reopen: *PPE – State Specific*

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- Some California cities/counties have adopted local rules requiring that non-medical essential workers wear masks while at work:
  - City of Los Angeles Worker Protection Order  
<https://www.lamayor.org/sites/g/files/wph446/f/page/file/WorkerProtectionOrdAPR10.pdf>
  - Requires all non-medical essential workers in the City of Los Angeles to wear non-medical grade face coverings while performing working.
  - All customers and visitors must also wear face coverings over their noses and mouths.
  - All persons are encouraged to wear face coverings anytime while outside the home.



## Planning to Reopen: *PPE – State Specific*

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- Los Angeles County joined on April 15, 2020  
[http://publichealth.lacounty.gov/media/Coronavirus/HOO\\_Safer%20at%20Home%20Order%20for%20Control%20of%20COVID\\_04102020.pdf](http://publichealth.lacounty.gov/media/Coronavirus/HOO_Safer%20at%20Home%20Order%20for%20Control%20of%20COVID_04102020.pdf)
- On April 17, 2020, the City and County of San Francisco, and the Bay Area counties of Sonoma, Marin, San Mateo, Contra Costa and Alameda issued orders requiring employees working at essential businesses to wear “face coverings”, <http://www.acphd.org/media/569455/health-officer-order-20-08-face-coverings-2020.04.17.pdf>
- San Diego has similar requirements for employees who have contact with the public, business that serve or sell food, pharmacies and drug stores, gas stations and convenience stores, <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/HealthOffice/OrderCOVID19.pdf>
- Beverly Hills, Glendale and Riverside County require ALL residents to wear face covering whenever leaving the house, <https://www.beverlyhills.org/cbhfiles/storage/files/19071377731728922681/Finalorder.pdf>

# Managing Your Workforce: *New Claims of Discrimination*

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DAVID BARRON



# Rise in Traditional Discrimination Claims

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Employers may see a rise in lawsuits from “Vulnerable Employees” claiming they were not hired or were terminated because of fears of increased absenteeism or inability to work if they get sick from Covid-19, from parents who need to care for children out of school, or from Asian employees due to xenophobia.

- Age Discrimination
- Disability Discrimination
- Gender Discrimination
- National Origin Discrimination

1. Elderly individuals.

2. Individuals with serious underlying health conditions, including high blood pressure, chronic lung disease, diabetes, obesity, asthma, and those whose immune system is compromised such as by chemotherapy for cancer and other conditions requiring such therapy.

# Hiring and Firing in Post-Covid 19 World

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**Chile's 'immunity passport' will allow recovered coronavirus patients to break free from lockdown, get back to work**

BUSINESS

## **Amazon Aims to Test All Employees for Covid-19**

Bezos, in shareholder letter, says company has begun assembling equipment to build its first lab

CORONAVIRUS

**Up to 2.7 Million in New York May Have Been Infected, Antibody Study Finds**



# Discrimination Against Covid-19 Victims

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**Can an employer conduct pre-employment Covid-19 testing and refuse to hire applicants who test positive?**

- Although the testing capability is not there (yet), the EEOC Guidelines for Pandemic Preparedness say YES as long as the employer follows the ADA requirements for the timing of medical examinations (i.e. after a conditional offer has been made); and requires all applicants to take the test.



# Discrimination Against Covid-19 Victims

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**Can an employer terminate an employee who tests positive for Covid-19 after engaging in risky behavior like going to the beach or traveling to a “hot spot”?**

- For current employees who test positive for Covid-19, there are a number of available causes of action for discrimination or retaliation under ADA, FMLA, FLSA (Paid Sick Leave under Families First Act) and applicable state laws.
- Although technically, discipline for engaging in prohibited behavior is different from discipline for being sick or absent, this is almost certainly likely to be challenged, and would require an actual policy be in place and enforced consistently. Many states also have laws prohibiting discipline against employees who engage in “lawful off duty activity.”

# Preference for Recovered Victims: Immunity Discrimination

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If Covid-19 continues to be a lingering threat to businesses, or returns in seasonal waves, employees who have immunity will be more desirable. Imagine the competitive advantage of an essential business with a workforce that will not get Covid-19, and will not put customers at risk of getting Covid-19. Imagine a world where employers could test employees to determine if they were immune.

That world may be here soon through inexpensive antibody testing, and raises difficult questions.

- Can employers test applicants or employees for immunity?
- Will applicants tout their immunity on resumes?
- Will the government regulate immunity certificates (as some have proposed) to avoid fraud?

# Immunity Discrimination Theories

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- 1. Disability discrimination** – This is a preference to those who have been sick and recovered, and against those who are well. It is the opposite of disability discrimination. That said, beware of adverse impact arguments because disabled individuals are more likely to shelter in place and therefore less likely to have been exposed.
- 2. Age discrimination** – The preference for immune workers is age neutral – how could it be age discrimination? Again, beware of adverse impact arguments related to older workers being less likely to have been exposed because of sheltering in place.
- 3. Genetic Information Discrimination (GINA)** -- Is an antibody test a “genetic test?” The law states: “genetic test does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.” Since antibodies are proteins made by immune cells, GINA would appear to not be applicable.

# Best Practices to Avoid Discrimination Claims

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1. Train managers on permissible subjects for job interviews – it will be hard to avoid discussion of Covid-19 and that will lead down a dangerous path.
2. Any and all testing or medical inquiries should be done in accordance with ADA guidelines, be job related and applied consistently. Create a written policy with guidelines and protocols for managers to apply.
3. No good deed goes unpunished – Don't presume an older or disabled person does not want a job or an assignment (like traveling).
4. Be open to reasonable accommodation requests - religion, disability, pregnancy.
5. Wherever possible, base policies on CDC and government recommendations or guidelines, and be ready to change policies if recommendations or situation on the ground changes.

# Managing Your Workforce: *Reasonable Accommodations*

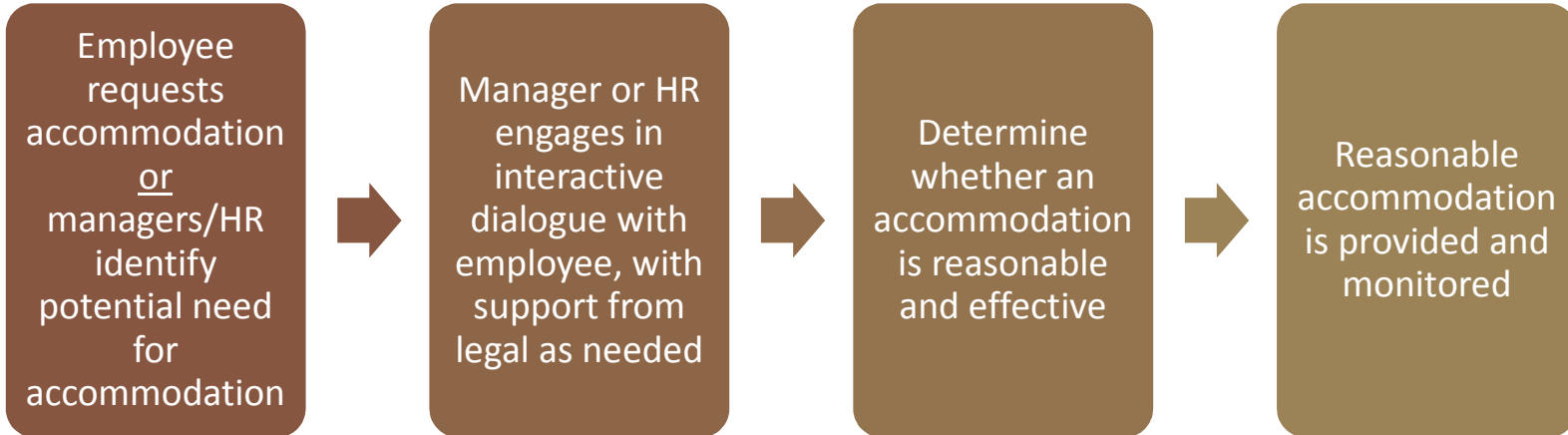
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JENNIFER T. WILLIAMS



# Overview of the ADA Process

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# Preparing for Return to Work Accommodation Requests

- Train BOTH management team and HR team to ensure awareness of available FFCRA benefits
- Remind BOTH management team and HR team that interactive process framework has not changed – even if results have changed
- Ensure that managers understand ANY negative comments about FFCRA leave usage are potentially problematic:

## Eastern Airlines Accused Of Firing Exec Over COVID-19 Leave



By [Danielle Nichole Smith](#)

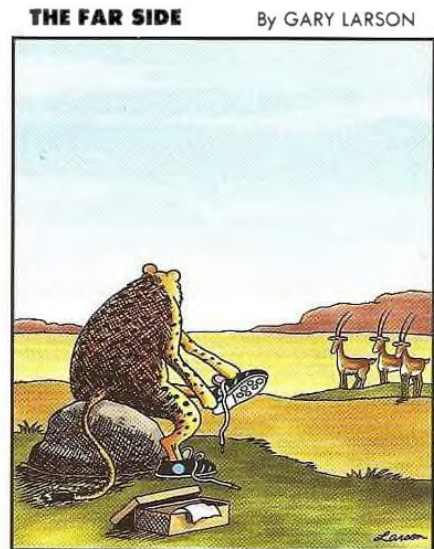
Law360 (April 16, 2020, 8:26 PM EDT) -- A former director at Eastern Airlines hit the company with a suit in Pennsylvania federal court Thursday, claiming she was fired for trying to take time off under the Families First Coronavirus Response Act, a law Congress recently passed to address the COVID-19 outbreak.

### Attached Documents

[Complaint](#)

### Useful Tools & Links

[Add to Briefcase](#)



# Managing Your Workforce: *New Problems to Consider*

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## ESSENTIAL VS. NON-ESSENTIAL JOB DUTIES – THEN AND NOW

- Has your industry shifted?
- Has the focus of your business shifted?
- Have the essential functions of a job changed?
  - physical requirements (*e.g.* teleworking)
  - Reallocate some previously essential job duties
  - Eliminate previously essential job duties
  
- Does your business still intend to rely upon pre-Coronavirus essential functions?





# “Essential” vs. “Non-Essential”

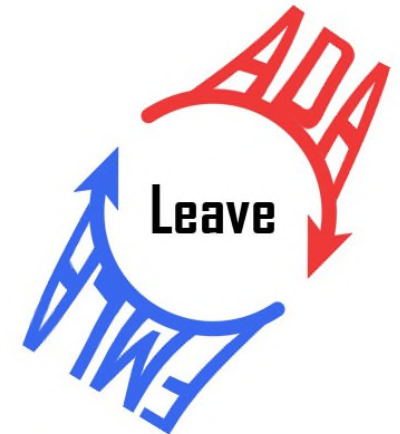
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- Written Job Descriptions

- If the answers to any of these questions are “Yes” – it is important to update your job descriptions accordingly for ADA accommodation purposes, BUT:

1. employers do not have to remove essential job functions;
2. return to work certifications (as with all medical exams/inquiries) have to be job-related and consistent with business necessity

- Also under FMLA, essential job functions can impact both the employer’s RTW certification and “substantially equivalent” position



# Managing Your Workforce: *New Problems to Consider*

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## A NEW ERA OF REASONABLE ACCOMMODATION REQUESTS:

1. Requests for PPE
2. Requests for extended leave
3. Mental/emotional disabilities
4. Requests for continued telework



# Managing Your Workforce: *Requests for PPE*

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- **New Problems created by the Coronavirus:**

- Employees requesting to wear their own PPE such as masks, sanitizers, etc. in order to come back into the office environment
- Employees requesting that employers provide PPE at the employer's cost
- How to prove undue hardship? Employer may take into account decreased cash from COVID-19 to establish that providing PPE would entail “significant costs”



# Managing Your Workforce: *Extended Leave*

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- Not as much a new problem as a new strain of a classic problem – akin to COVID itself
- Employers retain obligation to provide extended leave where reasonable under ADA
- The definition of “reasonable” may have changed in situations where employees have been furloughed and/or placed on extended leave by the employer
  - Does employee work in essential position that remained open during COVID?
  - Does employee work in non-essential position & didn’t provide services during COVID?



# Managing Your Workforce: *Mental/Emotional Disabilities*

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- Non-physical disabilities traditionally have been challenging for employers to accommodate.
- The following accommodation requests are likely on the horizon:
  - Employees are anxious/nervous about returning to office environment
  - Employees are fearful of contracting COVID-19 in the office and passing to others at home
  - Employees are concerned that office environment will trigger pre-existing mental disabilities – is there a difference between the employee’s own condition and an emotional disability for their spouse, parent, child?



# Managing Your Workforce: *Continued Teleworking*

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- Significant shift of most business operations to remote work during the pandemic takes away many of these concerns. Now employers should be evaluating:
  - Is regular attendance an essential job function? For which roles?
  - What is the impact of state/local laws for employers with a national operations?
  - Does the employee's reason matter going forward?
  - How to achieve consistency under anti-discrimination laws while complying with interactive process?



# Managing Your Workforce: *Accommodation Best Practices*

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- Do not wait until operations re-open. Review current employee accommodations and begin assessing whether/how those accommodations can be presented when employees return to office environment;
- Ensure managers/supervisors know to send employees to HR for interactive process;
- Consider placing an end date on accommodation and/or approving on a temporary basis;
- Stay in communication with employees who requested accommodations pre-COVID and during-COVID to get those requests resolved proactively.



# Managing Your Workforce: *Teleworking & Cybersecurity*

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AARON HOLT





# Protecting Confidential Information and Trade Secrets

- **Non-Compete, Non-Solicitation, Confidentiality and Non-Disclosure Agreements typical provisions:**

- Nature of information is such that greater protection is needed;
- Employee receives confidential information/trade secrets for use during his/her employment; and
- Requires employee to treat information as confidential...or else!

- **BUT – this applies to employers too!**

- See e.g. *CMBB LLC v. Lockwood Mfg., Inc.*, 628 F.Supp.2d 881, 885 (N.D. Ill. 2009) (The company's "failure to ensure that [defendant]'s laptop was stripped of [allegedly protected information] when she left the company goes to show that it did not treat such information as confidential or a trade secret.")



"Yes, Peters, it is just legalese. It's all just legalese. We're a law firm."

# Protecting Confidential Information and Trade Secrets

- **New Problems created by the Coronavirus:**
  - Employees using confidential information on personal computers while teleworking;
  - Employees taking home physical copies of confidential information;
  - Employees sending work emails to cloud-based personal accounts; and
  - Security concerns for virtual meet platforms.



*"Yes, Peters, it is just legalese. It's all just legalese. We're a law firm."*

# Best Practices For Protecting Confidential Information

- Create/revise **written acknowledgement** for employees allowed to telework who need access to Confidential Information:
  - Exigent circumstances due to Coronavirus
  - Required to abide by Confidentiality Agreement while Teleworking, including protecting Confidential Information
  - Affirm will use a password protected, encrypted (WPA2 or WPA3) home network
    - Federal Trade Commission Guidance on [Securing Your Wireless Network](https://www.consumer.ftc.gov/articles/0013-securing-your-wireless-network) (<https://www.consumer.ftc.gov/articles/0013-securing-your-wireless-network>)
    - Federal Trade Commission Guidance on [Securing Your Remote Access](https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity/securing-remote-access-to-your-network) (<https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity/securing-remote-access-to-your-network>)
  - Affirm will never leave laptop unsecure or unattended



*"Yes, Peters, it is just legalese. It's all just legalese. We're a law firm."*

# Best Practices For Protecting Confidential Information

- Create/revise **written acknowledgement** for employees who leave employment while teleworking:
  - Acknowledge continued obligation to abide by terms of Confidentiality Agreement *after* employment ends
  - Affirm they have searched for all Confidential Information on any electronic device used while teleworking
  - Affirm they have returned all Confidential Information used while teleworking
  - Affirm they have not disclosed any Confidential Information to any unauthorized third party pursuant to the terms of the Confidentiality Agreement



"Yes, Peters, it is just legalese. It's all just legalese. We're a law firm."

# Cybersecurity

**The Washington Post**  
*Democracy Dies in Darkness*

## The Cybersecurity 202: Hospitals face a surge of cyberattacks during the novel coronavirus pandemic



By **Joseph Marks**  
April 15



## FBI sees spike in cyber crime reports during coronavirus pandemic

BY MAGGIE MILLER - 04/16/20 03:27 PM EDT

8 COMMENTS

77 SHARES

f SHARE

t TWEET



THE CORONAVIRUS CRISIS

## Cybersecurity Lawyer Who Flagged The WHO Hack Warns Of 'Massive' Remote Work Risks

March 30, 2020 - 5:00 AM ET  
Heard on [Morning Edition](#)



# Cybersecurity

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- **Common methods of attack:**

- Phishing emails referencing the Coronavirus/COVID-19
- Text messages to mobile devices that include malicious links
- Exploitation of VPN products that have not been updated
- Communication platform exploits to conferencing solutions such as Zoom and Microsoft Teams
- Attacks through unsecured Remote Desktop sessions



# Cybersecurity Best Practices

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## General

- Avoid links from unsolicited emails and be cautious opening attachments.
- Be suspicious of any email from an unknown source with a sense of urgency
- Watch out for unsolicited messages labeling themselves as a medical authority or information about Coronavirus-related stimulus checks.

## For Teleworkers

- Require strong passwords for any teleworkers using their home network.
- Require VPN connections and two-factor authentication, if possible.
- Update your VPN platforms. Exploits are being found and patched on a weekly basis.
- Lock virtual meetings when they begin (no new participants can join) and require meeting passwords.



# Cybersecurity Best Practices

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- Federal Trade Commission Guidance for Small Businesses:
  - Cybersecurity Basics  
([https://www.ftc.gov/system/files/attachments/cybersecurity-basics/cybersecurity\\_sb\\_cyber-basics.pdf](https://www.ftc.gov/system/files/attachments/cybersecurity-basics/cybersecurity_sb_cyber-basics.pdf))
  - Cyber Security Fact Sheet  
([https://www.ftc.gov/system/files/attachments/cybersecurity-small-business/cybersecurirty\\_sb\\_factsheets\\_all.pdf](https://www.ftc.gov/system/files/attachments/cybersecurity-small-business/cybersecurirty_sb_factsheets_all.pdf))



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# New Problems to Consider: *Employee Complaints About Working During COVID*

RETAIL

## With strikes and a 'sick out,' some grocery and delivery workers take defiant stance: One-time bonuses, temporary pay hikes aren't enough

PUBLISHED TUE, MAR 31 2020 5:01 PM EDT | UPDATED TUE, MAR 31 2020 8:34 PM EDT



Melissa Repko  
@MELISSA\_REPKO



Annie Palmer  
@ANNIERPALMER

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TECH CORONAVIRUS

## Instacart workers will walk out on Monday for better sick leave and virus protections

'People are doing this literally to save their lives,' says organizer

By Kim Lyons | Mar 27, 2020, 2:52pm EDT

   SHARE

BUSINESS

## 'Us grocery store workers need to be fairly compensated.' Protests at Amazon, Whole Foods begin.

Mike Snider USA TODAY

Published 11:19 a.m. ET Mar. 31, 2020 | Updated 6:08 p.m. ET Mar. 31, 2020



# Can Employees Who Falsely Call in Sick Be Disciplined?

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- Employers can still enforce their attendance policy, but must ensure they are treating employees consistently. Employers should also consider the context because technical enforcement of attendance during COVID is difficult to justify.
- It is unlawful to discriminate against employees based on exercising their rights under Section 7 of the NLRA – i.e. organizing or protesting.
- **What is protected, concerted activity under the NLRA?** Two or more employees acting together to try to improve their wages, hours or conditions of employment. May include:
  - Employees asking about hazard pay during the Coronavirus
  - Employees asking about safety concerns (e.g. masks, sanitation, distancing)
  - Employees refusing to work without adequate Personal Protective Equipment
- **What is a strike?** A concerted work stoppage for economic reasons (*i.e.* more pay) or to protest unlawful actions. Strikers cannot be fired, but economic strikers can be permanently replaced. Employees striking over unlawful actions by the employer can only be temporarily replaced.
- **Does it matter if the company is non-union?** It is unlawful to discipline employees for protected concerted action even if the employees are not represented by a union.

# Refusal to Perform Unsafe Work

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“[A]s a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.” OSHA § 12(b)(1).

An employee’s right to refuse to do a task is protected only if **all** of the following conditions are met:

1. Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
2. The employee refused to work in “good faith.” (**employee must genuinely believe that an imminent danger exists**); and
3. A reasonable person would agree that there is a real danger of death or serious injury; and
4. There isn’t enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.



# Legal Update: *CARES and FFCRA*

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JEREMY GLENN



# Legal Update:

## *FFCRA Clarity*

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- Any Covered Employer (less than 500 employees) that re-opens and brings workers back from furlough, or hires new employees, will have to contend with FFCRA through December 31, 2020.
- Post Notice of Rights in workplace:  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)
- Emergency Paid Sick Leave (EPSL) for up to 2 weeks (80 hours) after 1<sup>st</sup> day of work
- Expanded Family Medical Leave Act (EFMLA) leave for Childcare/Covid-19 reasons after 30 days
- Tax credits for Employers on EPSL and EFMLA payments up to daily caps and maximums
- Department of Labor resources -- Updated FAQs (most recently on April 20, 2020)

# Legal Update:

## *FFCRA Clarity – Who is Exempt?*

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Covered Employers can exclude “health care providers” and “emergency responders” from the FFCRA paid leave programs.

Question: Can the exclusion be applied for some qualifying events (childcare due to school closure) but not others (personal illness)?

Answer: The revision to the DOL FAQs suggests that employers can pick and choose among qualifying events in terms of electing the exclusion.

FAQ # 56-57: “To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers (and emergency responders) from the provisions of the FFCRA. For example, an employer may decide to exempt these employees from leave for caring for a family member, but choose to provide them paid sick leave in the case of their own COVID-19 illness.”

# Legal Update:

## *FFCRA Clarity – How Much Leave Time?*

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How much EPSL for an employee with an irregular schedule?

### 6-Month Lookback based on calendar days

*e.g.* Full-time Fran worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the Fran was scheduled to work was 1,200 hours. The number of hours per calendar day is computed by dividing 1,200 hours by the **183 calendar days**, which results in 6.557 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 91.8 hours. Since this is greater than the statutory maximum of 80 hours, Fran is entitled to 80 hours of EPSL

*e.g.* Part-time Paul worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours the employee was scheduled to work, including all leave taken, was 650 hours. The number of hours per calendar day is computed by dividing 650 hours by the **183 calendar days**, which is 3.55 hours per calendar day. The two-week average is computed by multiplying the per calendar day average by 14, which results in 49.7 hours. Part-Time Paul is entitled to 49.7 hours of paid sick leave

# Legal Update:

## *FFCRA Clarity – Who is Exempt?*

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EFML leave time is calculated differently! How much EFML for an employee with an irregular schedule?

### 6-Month Lookback – but based on work days

Fran worked 1,150 hours over 130 workdays, and took a total of 50 hours of personal and medical leave. The total number of hours the employee was scheduled to work (including all leave taken) was 1,200 hours. The number of hours per workday is computed by dividing 1,200 hours by the **130 workdays**, which is 9.2 hours per workday. You must pay Fran for 9.2 hours per workday times 2/3 her regular rate for each day of EFMLA leave taken, subject to a \$200/day cap and \$10,000 max.

Paul worked 550 hours over 100 workdays, and took a total of 100 hours of personal and medical leave. The total number of hours Paul was scheduled to work, including all leave taken, was 650 hours. The number of hours per workday is computed by dividing 650 hours by the **100 workdays**, which is 6.5 hours per workday. You must pay Paul for 6.5 hours per workday times 2/3 his regular rate for each day of expanded family and medical leave taken, subject to a \$200/day cap and \$10,000 max.





# Legal Update:

## *FFCRA Clarity – What is the Regular Rate?*

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Straightforward for many employees – simply their regular hourly rate or set salary for 40-hour week.

“The average regular rate must be computed over all full workweeks during the six-month period ending on the first day that paid sick leave or expanded family and medical leave is taken.”

What about fluctuating pay plans?

Add up all compensation received (excluding OT premiums)

Divide by all hours worked

The result is the average hourly rate over the previous six-months of full workweeks.

What about Salary paid for fluctuating work week?

In this case, you would have to add up the salary you paid your employee over all full workweeks in the past six months and divide that sum by the total number of hours worked in those workweeks. If you lack records for the number of hours your employee worked, you should use a reasonable estimate

# Legal Update:

## *FFCRA Clarity – Requiring the Use of PTO?*

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With EPSL – this is new paid time off. An employer may not require employer-provided PTO to run concurrently with EPSL.

With EFML – can the Employer require employee to use accrued PTO with EFML payments?

Not during first two weeks of EFML – employee can choose to use EPSL, or their accrued PTO, or take the first two weeks of EFML as unpaid.

Yes, during last ten weeks of EFML, an employee can be required to use PTO in addition to 2/3 payment and thus will receive full pay.

# Legal Update:

## *FFCRA Clarity – Stay at Home Orders?*

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**Q: When can I take FFCRA leave for reasons relating to a State or Local Stay at Home Order?**

**A:** Under FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority. However, in order for such an order to qualify for FFCRA leave, being subject to the order must be the reason Employee is unable to perform work (or telework) that Company has. Employee may not take paid leave due to such an order if Company does not have work for employee to perform as a result of the order or for other reasons.

For example, if a Stay at Home order prohibits worker from leaving Chicago, but Company remains open in Indiana, and has work that cannot be done because the worker cannot leave Chicago, worker may take paid FFCRA leave.

If, however, Company closed the Indiana site because of Stay at Home Order, and, as a result of that closure, there was no work to perform, Employee is not entitled to FFCAR leave.



# Legal Update:

## *FFCRA Clarity – Who is Exempt?*

---

If audited, Company will have to prove to IRS that it properly paid the EPSL and/or EFMLA.

Want to have in your Records:

Employee name;

The date(s) for requested leave;

The reason for the leave; and

A statement that the employee is unable to work because of the above reason.

If requested leave because subject to a quarantine or isolation order or to care for an individual subject to such an order, collect and retain the name of the government entity that issued the order.

If requested leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, collect the name of the health care provider who gave advice.

If requested leave to care for child whose school or place of care is closed, or child care provider is unavailable, provide:

- The name of child;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for your child.

# Legal Update: *CARES Act*

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As of this broadcast the federal government **HAS** announced a second round of funding for the Paycheck Protection Program.

The PPP contains a loan forgiveness feature for employers that retain their workers and/or fill positions that were eliminated as a result of the COVID-19 crisis. Loan forgiveness under the PPP may be reduced if an employer's average number of full-time equivalent employees (or total wages) for a particular period of 2020 falls materially below the average during the same period in 2019 or earlier in 2020.

The PPP thus creates a significant incentive to bring back furloughed employees or otherwise fill empty positions. To maximize access to loan forgiveness, PPP recipients must restore staffing levels by June 30.

Companies may restore headcount and payroll in multiple ways.

# Legal Update: *CARES Act*

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## 1. Recall Furloughed or Laid-Off Workers

- PPP loans used to rehire or recall the same workers who were laid off or furloughed will be forgiven as long as they are rehired or recalled by June 30<sup>th</sup> and they are brought back with at least 75% of their previous pay. (See 1106(d)(5)).
- They know the business – are they still available?

## 2. Hire new employees

- PPP loans used to hire new workers will be forgiven as long as they are hired by June 30<sup>th</sup> and the payroll is at least 75% of the pre-loan amount. The number of full-time equivalents is what matters under the CARES Act – not necessarily the exact same workers. (See 1106(d)(2)).
- Consider time to conduct interviews and on-boarding new employees.

## 3. Restoring Pay Cuts

- PPP loans used to restore wages back to previous levels (or a portion thereof) will be forgiven as long as such “restoration” is at least 75% of what the worker was paid prior. (See 1106(d)(3)(A)).

# Final Thoughts on FFCRA/CARES Act

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**Loan Forgiveness:** This powerful feature of the PPP makes borrowers eligible for loan forgiveness on all loan proceeds used during the period that is eight weeks following the origination of the loan on (1) payroll costs, (2) mortgage interest payments, (3) rent payments and (4) utility payments. Forgiveness applies to both principal and any accrued interest.

**75% Rule:** 75% of loan proceeds must be used toward payroll costs. The remaining 25% may be used toward both forgivable and non-forgivable eligible uses.

Additional guidance expected on or before April 26. Stay tuned for new developments.



**Jennifer Taylor Williams**

[jtwilliams@cozen.com](mailto:jtwilliams@cozen.com)

(305) 704-5944

**Jeremy J. Glenn**

[jglenn@cozen.com](mailto:jglenn@cozen.com)

(312) 474-7981

**David Barron**

[dbarron@cozen.com](mailto:dbarron@cozen.com)

(713) 750-3132

**Bethany Salvatore**

[bsalvatore@cozen.com](mailto:bsalvatore@cozen.com)

(412) 620-6516

**Walter Stella**

[wstella@cozen.com](mailto:wstella@cozen.com)

(415) 262-8339

**Aaron Holt**

[aholt@cozen.com](mailto:aholt@cozen.com)

(832) 214-3961

**Matt Clyde**

[mclyde@cozen.com](mailto:mclyde@cozen.com)

(412) 620-6517

