



SPECIAL COVID-19 ALERT

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Avoiding Legal Pitfalls When Re-Opening Your Workplace: What Nonprofits and Businesses Need to Know

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As states lift “stay-at-home” orders during the COVID-19 pandemic, nonprofit organizations and for-profit businesses will undoubtedly be eager to reopen their workplaces and get back to business. When doing so, they will need to consider and navigate a multitude of workplace laws and risks. What kinds of employee lawsuits and claims can employers expect arising from shutdowns, furloughs, layoffs and resumption of work in the workplace? May an employee lawfully refuse to return to work? What potential liability could may an employer face in re-opening and/or continuing to allow work-from-home? Below we address many of those questions and provide some recommendations.

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## *Legal Risks and Considerations to Help Mitigate Them*

### **I. Disability Discrimination, Failure to Reasonably Accommodate and Retaliation**

#### **A. Overview**

As employers re-open, one of workers’ greatest concerns is whether the workplace will be safe when they return. And not surprisingly, one of the greatest legal risks to employers comes in the form of failure to reasonably accommodate disabilities.

Employers should expect to see an increase in claims of a failure to reasonably accommodate disability and other kinds of discrimination claims in connection with return to the workplace, filed with the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency enforcing the Americans with Disabilities Act (ADA), with State and local anti-discrimination agencies, and in court. This may be due in large part to employees with underlying health conditions that put them at greater risk of contracting COVID-19 seeking reasonable accommodations or employers unlawfully barring those same employees from returning to the workplace.

A reasonable accommodation might include allowing an employee with an underlying medical condition to continue working remotely if it allows them to perform the essential functions of the job and does not pose an undue hardship on the employer.

## **B. What are Reasonable Accommodations?**

Under the ADA, covered employers have a legal obligation to reasonably accommodate an employee's disability. If an employee refuses to return to work because he/she has an underlying medical condition putting them at a higher risk of contracting COVID-19, an employer must engage in an interactive, good faith process to find a reasonable accommodation that permits the employee to perform the essential functions of the job unless doing so poses an undue hardship on the employer.

The EEOC has continually updated its pandemic preparedness guidance entitled *What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus*. Significantly, the guidance addresses some reasonable accommodations the EEOC believes may meet the needs of an employee with an underlying medical condition that puts the employee at greater risk of contracting COVID-19. Absent undue hardship to the employer, those accommodations might include designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between clients and coworkers where feasible per CDC guidance or other accommodations that reduce chances of exposure. They might also include: temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment to allow an employee with a disability to safely perform the essential functions of the job while reducing exposure to others.

In addition, employers should remember that an employee with pre-existing mental or psychological conditions like an anxiety disorder, severe depression obsessive-compulsive disorder, or post-traumatic stress disorder exacerbated by the COVID-19 pandemic may also seek (and be entitled to) reasonable accommodations to enable them to perform the essential functions of the job where those conditions rise to the level of a disability. As with any accommodation request, under the ADA, covered employers (those with 15 or more employees) may ask questions to determine whether the condition is a disability; discuss how the requested accommodation would assist and enable that worker to perform the essential functions of the job; explore alternative, effective accommodations; and request medical documentation if needed.

The EEOC has further noted in its technical guidance relating to COVID-19 that the ADA does not permit employers to bar employees from returning to work or take other adverse action *solely* because an employee has an underlying medical condition that the CDC says might pose a "higher risk for severe illness" if he/she contracts COVID-19. Under the ADA, employers must do a thorough direct threat analysis, which includes an individualized assessment based on relevant factors and a determination of whether the threat can be reduced or eliminated through a reasonable accommodation. The EEOC advises flexibility by employers and employees in determining if some accommodation is possible in the circumstances.

## **C. Beware of Potential Age Discrimination Claims**

The EEOC has also warned that employers may not bar older workers from returning to work out of an employer's fear new that an older worker may be more susceptible to getting COVID-19 regardless of the employer's genuine desire to protect an older worker who may be more vulnerable to the virus. Barring older workers from returning to work because of their age would

likely constitute age discrimination under the Age Discrimination in Employment Act (ADEA) and likely also violate State or local anti-discrimination laws prohibiting age discrimination.

Nor may employers lawfully delay start dates of hires or withdraw job offers because of a person's legally protected status (like pregnancy or age—i.e., older than 65), merely because they may be at higher risk of contracting COVID-19. Employers should exercise care around these issues to avoid claims of discrimination or failure to reasonably accommodate a disability under federal, State and/or local laws.

#### **D. Be Aware of State and Local Laws**

State and local laws requiring reasonable accommodation of disability may define a “disability” more broadly than under the ADA and may also impose broader burdens on employers with respect to engaging in an interactive process to determine a reasonable accommodation.

For instance, according to the New York City Commission on Human Rights' guidance, New York City's Human Rights Law, unlike the ADA, requires an employer to engage in a cooperative dialogue with an employee about a potential accommodation if an employer knows that an employee has a medical condition that might place them at “higher risk for severe illness” if they get COVID-19, *even if the employee has not requested a reasonable accommodation*.

If an employer is unable to provide a reasonable accommodation because doing so would pose an undue hardship, the employer should document the basis for the “undue hardship.” Under the ADA, “undue hardship” must be based on an assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.<sup>1</sup>

#### **E. Additional Accommodations**

Employees already receiving accommodations for disabilities might be entitled to an additional or modified accommodation. For instance, a low-sight employee may need certain accommodations to adapt to floor plan reconfigurations that were implemented to ensure physical distancing due to COVID-19 such as one-way hallways. Deaf, lip-reading employees may need a modification to cloth face coverings. Other kinds of reasonable accommodations may be needed for employees with certain medical conditions. Employers should be mindful

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<sup>1</sup>A determination of undue hardship should be based on several factors, including: the nature and cost of the accommodation needed; the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility; the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity); the type of operation, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; the impact of the accommodation on the operation of the facility. Laws in various jurisdictions with worker protection from disability discrimination may require a much higher threshold for an employer to establish an “undue hardship” than required under the ADA.

about ensuring employees are not retaliated against for seeking or receiving reasonable accommodations as retaliation is also unlawful.

#### **F. Health Screening, Temperature Checks and Confidentiality**

The EEOC has stated that-- based on guidance from the CDC and public health authorities--the COVID-19 pandemic qualifies as a “direct threat” within the meaning of the ADA. In its updated technical guidance, the EEOC, therefore, gave employers a “green light” under the ADA to conduct “medical examinations.” These include temperature checking, testing for COVID-19, and asking employees if they have symptoms associated with COVID-19 at this time, to confirm whether a particular employee may pose a direct threat due to infection.

Note, however, that the EEOC’s [technical guidance](#) warns employers that-- because of the CDC’s Interim Guidelines that antibody test results “should not be used to make decisions about returning persons to the workplace,”--an antibody test at this time does not meet the ADA’s “job related and consistent with business necessity” standard for medical examinations or inquiries for current employees. Therefore, the EEOC states that, under the ADA, **employers may not require employees to take an antibody test before returning to the workplace.**

After taking employees’ temperatures and recording those temperatures (indeed, some states are mandating that employers take employee temperatures), conducting questionnaires of employees, testing or other health screening addressing employee medical information, employers must ensure they keep such information confidential. Any such records or reports should be kept in a locked cabinet, with access only to those with a need-to-know. Employers might even consider adopting a threshold test (i.e., below 100.4 degrees) for determining acceptable temperature rather than recording the actual temperature.

Additionally, while employers should inform employees of possible exposure to COVID-19 if a co-worker is confirmed to have contracted the COVID-19 virus, **they must not disclose the identity of the employee who contracted the virus** because as noted above, employers are legally bound to maintain the confidentiality of an employee’s medical information. However, that prohibition would not preclude an employer from disclosing the employee’s identity to State or local public health authorities for contact tracing purposes to prevent the spread of COVID-19.

#### **G. Testing Accuracy**

Employers conducting COVID-19 testing should ensure any such testing is undertaken consistent with current medical knowledge and the best available objective evidence, including by selecting tests with reasonably confirmed rates of accuracy and by strictly following test manufacturers’ guidelines and instructions for use. In addition, employees may be asymptomatic and without fever while still carrying the virus so a temperature check may not always be an effective screen for the virus. Conversely, employees may present with symptoms though they are not infected with COVID-19. Employers should continue to review the CDC’s website for updates on COVID-19 testing and symptoms.

## **TAKE-AWAYS - What Should Employers Do to Help Mitigate Legal Risks?**

- Follow EEOC, State, local anti-discrimination/reasonable accommodation guidance;
- Be flexible in arriving at reasonable accommodations;
- Document the reasonable accommodation process, cooperative dialogue (where required), and the outcome of the process, including the basis for any “undue hardship” defense where an accommodation is denied;
- Re-issue policies on reasonable accommodation and anti-retaliation and provide a form for employees to request reasonable accommodations;
- Train managers on employee rights with respect to reasonable accommodations, how to effectively handle and document such requests and the reasonable accommodation process, and how to identify retaliation and enforce the policy prohibiting it;
- Communicate with employees who are currently receiving reasonable accommodations before their return to the workplace about additional or modified accommodations, where applicable and permitted; and
- Ensure medical information, like temperature taking, testing results, and employee questionnaire results regarding COVID-19 symptoms, is kept confidential.

## **II. Other Types of Unlawful Discrimination/Harassment**

### **A. Unlawful Discrimination in Furloughs/Layoffs/Salary or Hours/Reduction/Remote Work/Recall**

Employers may face claims of age, gender or caregiver discrimination where, for instance, they refuse to recall to work older workers or those with children at home, or deny employees’ leave to care for a child or a disabled family member (while providing leave to non-caregivers) under State or local laws protecting caregivers. They might also face claims of discrimination based on an employee’s association with a person with a disability in jurisdictions that provide that legal protection if they terminate, refuse to recall or take other adverse employment action against such an employee. Employers may also face other kinds of discrimination claims (i.e., sex, race, age, etc.) in their selection of employees for recall to work, layoffs, furloughs, and continued remote work from home, salary or hours reduction.

To minimize the risk of a claim of disparate treatment (treating someone less favorably than another because of that person’s legally protected status) employers should closely examine and document the basis for selecting an individual for recall, whether it is for operational needs or other legitimate non-discriminatory reasons. Where the employer is taking an adverse employment action like furlough or layoff, it should document its neutral or objective legitimate, non-discriminatory basis for such action taken, and communicate this to affected staff.

Employers would also be well advised to probe the decision-making process by the manager/supervisor who made the decision. Be consistent and fair; ensure there is no favoritism or personal sympathy guiding a manager’s decision to treat one employee more favorably than another rather than objective criteria.

Furthermore, employers may want to analyze the disparate impact of any proposed reduction-in-force (RIF), furlough, salary or hours reduction to ensure it is not negatively and disproportionately affecting any legally protected group such as women, employees age 40 and over and employees of a particular race. Review the selection process and method used that yielded the group selected.

If severance pay is going to be provided to terminated employees, employers would be well advised to get a release of claims from those employees in exchange for the severance pay. If the employer is covered by the Age Discrimination in Employment Act (ADEA) (for those with 20 or more employees) and any of the employees to be terminated and offered severance pay are age 40 or over, the employer must comply with the specific provisions of the ADEA (as amended by the Older Workers Benefit Protection Act) and associated regulations. Specifically, where conducting a reduction-in-force affecting a group of two or more employees age 40 and over, an employer must provide them with 45 days to consider whether to sign a waiver of age discrimination claims under the ADEA, certain disclosure information required under the Older Workers Benefit Protection Act, and 7 days to revoke their acceptance of the agreement. If just one employee over 40 is to be terminated, then only 21 days would need to be provided to the employee to consider whether to sign a waiver of an age discrimination claim, plus 7 days' revocation period. Certain States may require employers to take additional steps upon separating an employee from employment, such as: 1) providing written termination notices setting forth exact dates of termination of employment and benefits within a certain period following termination, 2) paying accrued benefits like paid vacation; and 3) providing payment of the final paycheck within a certain period of time, among other requirements. Failure to take these steps may result in penalties.

When implanting policies in response to COVID-19, do not discriminate against or treat workers less well based on their legally protected status, including age, gender, race, national origin, and disability, among others.

In sum, apply objective, non-discriminatory criteria for selecting employees to minimize the risk of a discrimination claims (e.g., job performance, seniority, position is amenable to remote work, particular skill set needed in the physical workspace, etc.), when furloughing, terminating, recalling employees to work, hiring or deciding whether to permit an employee to continue working remotely.

For salary reductions, ensure those are implemented across-the-board for groups at a particular level in the organization or departments rather than "cherry-picking" individuals to minimize the risk of a discrimination claim. And consider the pay equity implications of reducing salaries or cutting hours, particularly if there are already pay disparities between men and women in a particular job position. If you are recalling employees following furlough, consider rectifying any pay discrepancies promptly upon recall or rehire.

## **B. Pandemic-Related Harassment against Asians**

In the EEOC's updated technical guidance related to COVID-19 and the ADA and other EEO laws, it noted an uptick in discrimination against Asians due to the novel coronavirus originating

in Wuhan, China. Employers and their managers must remain vigilant in preventing and not tolerating derogatory or disparaging remarks or conduct about or directed at Asians to prevent a claim of a hostile work environment based on race or national origin under Title VII of the Civil Rights Act of 1964. Consequences for violation of that law may include an award of backpay, compensatory damages, punitive damages, attorneys' fees and costs and injunctive relief allowing for job reinstatement.

### **TAKE-AWAYS - What Should Employers Do to Prevent Unlawful Harassment and Discrimination?**

- Refresh anti-harassment training of supervisors and managers, reminding them of their responsibilities to watch for, stop, and report any harassment or other discrimination, and train employees on the complaint reporting processes;
- Consider whether to re-issue anti-harassment policies and ensure political discourse in the workplace does not spill over into hateful speech and conduct relating to one's legally protected status. Remind employees that employer will promptly review any allegations of harassment or discrimination and take appropriate action.

## **III. Safety/Health Issues**

### **A. OSHA— “Whistle While You Work”**

One of the top concerns among employers during the pandemic and one of the greatest workplace legal risks is safety and health when employees return to the workplace during a pandemic. There have been reports in the news of employees at Walmart, Target, Amazon, Whole Foods and others going on strike in union settings or staging “sickouts” in non-union settings to protest what they feel are unsafe work conditions in light of COVID-19.

Employers should expect to see more safety and retaliation complaints raised internally and/or filed with OSHA, worker strikes in union settings, and potentially litigation.

#### **1. OSHA Complaints and Litigation**

The Occupational Safety and Health Administration (“OSHA”) requires employers to establish a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees.<sup>2</sup> Under the Occupational Safety and Health Act, retaliation for filing an OSHA complaint is unlawful and carries penalties as well.

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<sup>2</sup> With the Occupational Safety and Health Act of 1970, Congress created the Occupational Safety and Health Administration (OSHA) to ensure safe and healthful working conditions for workers by setting and enforcing standards. OSHA is part of the United States Department of Labor.

McDonald's employees in Chicago, Illinois recently filed a complaint with OSHA citing “serious and imminent hazards” after a co-worker tested positive for COVID-19. Workers went on strike the following day and other workers at McDonald’s throughout the U.S. have done the same. The employees asserted in the OSHA complaint that: 1) they would be disciplined or fired if they stayed home, and that McDonald’s response puts their health and customers' health at risk; 2) conditions in their store pose an imminent danger to their health and that of their coworkers; 3) managers did not inform all the workers who were in the store and might have had contact with a sick worker; and 4) the company had not done any additional sanitizing of the store beyond the usual daily cleanup after the company found out about a worker with COVID.

Safety and health issues are the province of OSHA, but when those McDonald’s workers were unsatisfied by a lack of response from OSHA regarding their COVID-19 safety concerns, they, together, with employees of several Illinois McDonald’s franchisees and their family members filed a lawsuit in court, alleging that McDonald’s had mismanaged safety protocols in four Chicago restaurants, causing unsafe conditions and a “public nuisance” that could endanger public health, and seeking a preliminary injunction against the restaurants.

The workers sought relief from the court to compel those McDonald’s to implement safety policies, require customers and workers to wear masks and to supply adequate personal protective equipment. They further claimed that the company forced them to work in close quarters with colleagues and customers who might be asymptomatic carriers, reuse dirty masks or gloves if they were provided with such protective gear at all and not report if workers were absent or suspected of being sick. They also claimed unsafe practices such as not providing hand sanitizer or safety training to employees; being accused of stealing gloves if they asked for new ones; and having had managers direct them not to talk about colleagues who were infected or absent. The McDonald’s subsidiary had told workers they could be less than six feet apart for up to 10 minutes at a time (not something that had been recommended by any public health agencies).

On June 24<sup>th</sup>, the judge granted the workers’ request a preliminary injunction, in part, finding that some of the franchises at issue had not properly trained employees on proper social distancing protocols or monitored workers to ensure they properly wore masks in a manner consistent with the Governor’s social distancing orders.

Five McDonald’s workers in California brought a similar “public nuisance” suit against an Oakland McDonald’s, after going on strike, seeking closure of the restaurant until the owner complied with minimum COVID-19 safety/health standards and Oakland’s paid sick leave laws.

On June 25<sup>th</sup>, a judge granted a temporary restraining order, directing the McDonald’s closed until the owner improved its health and safety practices (specifically, making protective gear available to employees, implementing physical distancing measures, temperature checks, an adequate supply of masks and gloves, granting leave to sick workers and “deep cleaning” the restaurant in order to reopen). The workers sued the owner over a COVID-19 outbreak, claiming the owner failed to inform them they had been exposed to COVID-19 and to self-quarantine, told

them to make masks out of dog diapers and coffee filters, and claiming that the outbreak affected 35 individuals, including one employee's 10-month-old child.

In other litigation, the family of a Walmart employee in Illinois who died from complications of COVID-19 recently filed a wrongful death lawsuit against Walmart.

## 2. New OSHA Guidance

On May 18, the AFL-CIO, the largest labor federation in the U.S., also filed an emergency petition in the D.C. Circuit Court of Appeals against OSHA and the U.S. Department of Labor, seeking the court to compel OSHA to issue a mandatory Emergency Temporary Standard for Infectious Diseases ("ETS") to prevent the spread of COVID-19 in the workplace. On June 11<sup>th</sup>, the court denied the petition, stating that OSHA has the authority to decide whether to issue such standards.

Following the AFL-CIO's filing of its petition, on May 19, OSHA revised its enforcement guidance for recording cases of COVID-19 in the workplace, which took effect on **May 26, 2020**. OSHA's new guidance requires covered employers--not just those with high levels of COVID-19 exposure in the workplace like healthcare, emergency response and correctional institutions--to determine whether employees who have contracted COVID-19 did so at work and to record those illnesses. The new OSHA requirement reverses previous guidance which limited such reporting to the above referenced high-risk workplaces.<sup>3</sup>

OSHA states that it will enforce the recordkeeping requirements for employee COVID-19 illnesses for all covered employers according to its guidelines. Recording a COVID-19 illness does not mean that the employer has violated any OSHA standard. An employer must determine whether it is *more likely than not* that exposure in the workplace played a causal role with respect to a particular case of COVID-19. If an employer is unable to do so, then it does not need to record that COVID-19 illness.<sup>4</sup>

On June 10, 2020, OSHA issued return-to-work [guidance](#), indicating that employers may require employees to wear cloth face coverings (which are not considered personal protective equipment--PPE) as a measure to prevent the spread of COVID-19 in the workplace. Among other things, the guidance also stated that if an employer implements health screening or temperature checks and chooses to create records of this information, those records might qualify

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<sup>3</sup> Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus employers are responsible for recording cases of COVID-19, if:

- The case is a confirmed case of COVID-19, as defined by the CDC (CDC);
- The case is "work-related" as defined by OSHA's regulations (29 CFR § 1904.5); and
- The case involves one or more of the general recording criteria set forth in OSHA regulations (29 CFR § 1904.7).

<sup>4</sup> Employers with 10 or fewer employees and certain employers in low-hazard industries (which include many nonprofits) have no recording obligations; they need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye.

as medical records under OSHA's Access to Employee Exposure and Medical Records standard and would need to be maintained during the worker's employment and for 30 years (if the temperature records were made or maintained by a physician, nurse, or other health care personnel, or technician). The employer would also have to follow confidentiality requirements. It also noted that employers need not make a record of temperatures when they screen workers, but instead may acknowledge a temperature reading in real-time.

### **3. Penalties**

Employers who have not adhered to CDC, OSHA, and other public health/workplace guidance and have not done enough to keep employees safe may be subject to employee complaints about workplace safety and retaliation to federal OSHA and State OSHA agencies.

Employers who violate OSHA's safety and recordkeeping requirements can face citations by the U.S. Department of Labor, civil penalties, and steep fines. Depending on the exact circumstances and history of OSHA violations, inspectors can fine an employer up to \$13,260 per violation, \$13,260 per day beyond the abatement date for failure to abate the violation, and \$132,508 *per* violation for willful or repeated violations (failure to properly record an injury or illness). Employers could also potentially face additional liability and damages in a private whistleblower lawsuit that is based on a complaint to OSHA about safety violations (in states with whistleblower laws).

#### **B. National Labor Relations Act Rights/Union-Organizing Activity**

**May your employee lawfully refuse to report to your worksite due to safety concerns?** The answer is that it depends on the particular facts.

The National Labor Relations Act (NLRA), enacted by Congress in 1935, gives private sector workers legal rights to join unions and bargain collectively with their employer. It also gives workers—non-union included--the right, without the threat of retaliation, to engage in “concerted activity” (typically in groups of two or more) regarding terms and conditions of employment—like wages, benefits, health and safety issues. Employees—whether non-union or union-- have a legal right to raise concerns about the workplace safety, to report unhealthy or unsafe working conditions, and to join together with other employees to complain about such conditions and any action or perceived inaction by management.

Indeed, an employee's refusal to return to work due to good faith safety concerns might be legally protected “concerted activity” under the NLRA where that employee is acting with one or more other employees to protest working conditions. That means that any action taken against that employee for exercising their rights under the NLRA could be viewed as unlawful retaliation. An employee in such circumstances could bring a claim before the National Labor Relations Board (NLRB). A finding by the NLRB of an NLRA violation could subject that employer to penalties such as back pay; reinstatement if the employee were fired and require the employer to publish a notice in the workplace and take other actions. Such an incident might also lead to negative publicity and make the workplace vulnerable to union-organizing activity.

An employer's refusal in a unionized workplace to provide health and safety information to a union, or unreasonable delays in doing so, could be considered an "unfair labor practice" in violation of NLRA Section 8(a)(5).<sup>5</sup>

Employers should expect to see an increase in union-organizing activity. With high unemployment in the U.S., unions may be experiencing a loss of dues and new members. Safety and health issues are at the forefront of workers' concerns in returning to their workplace, and those issues remain a key rallying cry of unions mobilizing workers. Therefore, employers of non-union workers should anticipate and plan for union-organizing at their worksites if they do not take adequate measures to ensure workers' safety.

### **C. Workers' Compensation Claims**

Employers may see a spike in COVID-19-related workers' compensation claims along with OSHA complaints arising from the workers' compensation filings.

Workers' compensation is intended to serve as the exclusive means for an employee to receive compensation for a work-related injury. Workers' compensation laws and coverage vary from state to state, thus COVID-19 illnesses contracted at work may not be covered by workers' compensation for all workers in all states.

Workers' compensation insurance provides both no cost medical treatment and wage replacement benefits for lost wages resulting from time away from work. If a worker dies due to a qualifying condition, the worker's family could be eligible for financial death benefits. As a result, these claims could be costly for employers, particularly if multiple employees file claims. The laws also prohibit retaliation against an employee for filing a workers' compensation claim.

### **Will Employers Be Liable for Damages if an Employee, Client, Volunteer, Visitor Contracts COVID-19?**

The answer to the question of whether an employer will be liable if an employee, client, volunteer, member, visitor or other person contracts COVID-19 at the employer's place of business remains unknown. Liability may depend on the jurisdiction where an employee is working, where the organization or business is located, and the nature of the organization or business.

An employer's failure to take steps to mitigate exposure to COVID-19 in the workplace (providing a clean and safe work environment, proper face coverings and personal protective equipment, cleaning/disinfecting, health screening and monitoring protocols) or failure to adhere to CDC, OSHA and other public health authority workplace safety guidance could potentially lead to claims of negligence, gross negligence, public nuisance, or a myriad of other claims.

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<sup>5</sup> Examples of health and safety information that employers with unions must provide to unions include: accident reports, company health and safety-related rules and policies, health and safety inspection records, health and safety investigative reports, and material safety data sheets.

## **Immunity for COVID-19 Related Illnesses or Death?**

To date, at least four states (North Carolina, Oklahoma, Utah and Wyoming) have enacted laws granting businesses some immunity from civil liability for claims relating to COVID-19, and legislation is proceeding in at least three other states. The governors of Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Tennessee, Vermont and Virginia have signed executive orders, granting various levels of limited immunity to health care providers and facilities.

These immunity laws in North Carolina, Oklahoma, Utah and Wyoming go further than the State executive orders. North Carolina, for instance, provides limited immunity from liability for any harm caused by COVID-19 to “essential businesses,” including grocery stores and restaurants, and certain not-for-profit organizations and educational institutions, and governmental entities, and “emergency response entities” (including manufacturers of PPE and ventilators). Oklahoma, Utah and Wyoming provide civil immunity to all businesses, as long as applicable federal, state and/or local safety guidance is followed. These bills have exclusions for willful misconduct, reckless infliction of harm or intentional infliction of harm. Kentucky provides immunity from suit to health care providers and businesses that make protective equipment in response to COVID-19 that ordinarily do not make such products. At the same time, certain States and municipalities including New York City might encourage employees to report (and even providing them with a hotline) if they believe that their employers are not following PPE, hygiene, social distancing or re-opening guidelines.

In Congress, House Minority Leader Kevin McCarthy (R-Calif.) and Senator Mitch McConnell (R-Ky) have said that any further COVID-19 relief legislation must include immunity from liability for businesses. Rep. Mike Turner (R-Ohio) has proposed the Employer and Employee COVID Protection Act, which would provide immunity from coronavirus lawsuits to employers that comply with state and federal laws on safe reopening. No federal legislation has been enacted to date.

## **TAKE-AWAYS - What Should Employers Do about Health and Safety Issues?**

- Adhere to guidance of CDC, OSHA, State and localities, and any executive orders, on implementing safety/health measures, social distancing, cleaning/disinfecting, health screening for employees and anyone coming on premises, monitoring, handling situation if employee contracts COVID-19 and notifying employees of potential exposure, contract tracing.
- Communicate regularly with employees about safety/health measures and provide a mechanism and forum for employees to raise safety/health concerns
- Ensure safety/health reports are addressed and investigated promptly

- Train employees on the proper use of face coverings and personal protective equipment and train managers on the new protocols/policy and how to enforce them, how to address safety/health concerns, legally protected concerted activity, and on enforcing policies prohibiting retaliation
- Review reporting/recordkeeping obligations under OSHA and State Workers' Compensation laws in the event an employee contracts COVID-19 at work
- Monitor changes to your state's workers' compensation laws and guidance as they relate to COVID-19
- Consider whether to use waiver of liability/assumption of risk waivers for attendees at organization-sponsored events, for volunteers, clients and others and determine whether your insurance policies will cover any COVID-19 related claims

#### **IV. Leaves of Absence/FMLA/FFCRA and Emergency Paid Sick and Family Leaves**

##### **A. Overview**

**Families First Coronavirus Response Act:** On March 18, 2020, the President of the United States signed Families First Coronavirus Response Act, or H.R. 6201 ("FFCRA") into law. FFCRA requires employers with fewer than 500 employees to provide their employees with emergency paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These paid leave provisions will remain in effect from April 1, 2020 through December 31, 2020. The law prohibits employers from disciplining, discharging, discriminating or retaliating against an employee under the FFCRA.

The FFCRA provides employees of covered employers with:

- Up to two weeks (up to 80 hours) of paid sick leave at the higher of: employee's regular rate of pay, or the applicable state or Federal minimum wage, up to caps of \$511 per day and \$5,110 in the aggregate, where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
- Up to two weeks (up to 80 hours) of paid sick leave at 2/3s of either the higher of the employee's regular rate of pay or the applicable state **or** Federal minimum wage - up to \$200 daily and \$2,000 aggregate for the entire two-week paid leave period. These leave benefits take affect if the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition (as

specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor); and

- Up to an additional 10 weeks' paid expanded family leave at 2/3s of either the higher of the employee's regular rate of pay, **or** the applicable state or Federal minimum wage - up to a cap of \$200 per day per employee and \$10,000, where an employee who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. You can find out more about the requirements of this law in our [earlier blog post](#).

## **B. Potential Legal Risks**

As employers return to the workplace, they may have to defend against employee complaints to the U.S. Department of Labor where they fail or refuse to provide the emergency paid sick and/or family leave required by the FFCRA or claims of unpaid wages where they fail to provide emergency paid sick leave, and/or litigation in court where an employer is covered under the Family and Medical Leave Act (FMLA) (employers covered under the FMLA where the employer has 50 or more employees in 20 or more workweeks in the current or previous calendar year).

Employers may also face legal risks if misapplying these laws or misunderstanding the interplay between the emergency paid family leave under FFCRA and the FMLA, or between these laws and State and local paid sick and family leave laws.

## **C. Risks Relating to Small Business Exception to Laws Providing Leave to Care for Child or Retaliation**

Another potential legal risk is misapplication of the small business exception under the FFCRA. Under the small business exception, employers with fewer than 50 employees can elect to be exempt from providing emergency family leave or paid sick leave to care for a son or daughter whose school or childcare is closed due to COVID-19. This exception applies only if providing FFCRA paid leave would jeopardize the business' viability as a going concern.<sup>6</sup> No exemption from providing the FFCRA's paid sick leave for other qualifying reasons is available. Employers could also be liable for retaliation against an employee for taking FFCRA leave.

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<sup>6</sup>An officer of the business must determine one of the following:

- The expense of providing paid sick or family leave would exceed available business revenue and cause the business to cease operating at a minimal capacity.
- The absence of employees requesting leave would create substantial risk to the financial health or operational capabilities of the business.
- The business does not have sufficient workers to perform the labor or services provided by the employees requesting leave, and such labor or services are needed for the business to operate at a minimal capacity.

## **D. Penalties**

Violations of the Emergency Paid Sick Leave Act under the FFCRA may result in damages and penalties as under the Fair Labor Standards Act, including for unpaid wages, an additional equal amount as liquidated damages, and attorneys' fees and costs. Remedies for violation of the Expanded Family and Medical Leave Extension Act (EFMLEA) under the FFCRA are the same as for violations of the Family and Medical Leave Act (FMLA) except that there is no private right of action in court for those FFCRA violations. Penalties may include back pay, prospective pay, liquidated damages (double damages), attorneys' fees and costs, interest, injunctive relief (such as reinstatement of employment).

Additionally, misapplication of the small business exemption could result in a loss of the payroll tax credit available to employers providing paid leave under the EPSLA and EFMLEA.

### **TAKE-AWAYS - What Should Employers Do to Minimize Legal Risks Associated with FMLA and Paid Leave?**

- Update policies on FMLA, emergency paid sick and paid family leave, State and local paid sick leave laws and COVID-19-related paid leave laws, and prohibiting retaliation, and ensure policies address any interplay between the various paid leaves and paid time off offered by the employer, and whether any leaves run concurrently, as permitted by law.
- Update managers' training on legal obligations and employees' training on their rights under federal FFCRA, FMLA, and other paid leaves under State and local laws, and on preventing retaliation against employees for taking job-protected leave. Post or distribute the FFCRA employee rights poster to employees.
- If invoking the small business exception under the FFCRA, document specifically each criterion your organization met to qualify for it.

## **V. Wage and Hour Issues**

### **A. Overview**

The Fair Labor Standards Act (FLSA) is a federal law that establishes the federal minimum wage, and imposes overtime pay and recordkeeping requirements on covered employers. The FLSA requires employers to pay employees at least the federal minimum wage (\$7.25/hr.) for all hours worked.

Employers must ensure they are complying with *both* federal and state wage and hour laws, including State minimum wage levels, certain state notice of pay rate requirements, record keeping, overtime pay (some states require overtime pay based on a daily number of hours worked), exemptions from overtime pay, frequency of pay, and wage statements. Employees

must be paid the State minimum wage in the State in which they are physically working to comply with State wage/hour laws.

Exempt employees (those exempt from overtime pay laws) must: 1) be paid on a salaried basis; 2) meet a salary threshold of at least \$684/week to be exempt from overtime pay requirements under the FLSA (and may need to meet a state's own salary threshold requirement to be exempt from overtime pay requirements under that state's wage/hour laws); *plus* 3) meet a job duties test to be exempt from the requirement for overtime pay.

## **B. Remote Work**

Many employees are continuing to work remotely, even as their businesses re-open. Under the FLSA and State wage/hour laws, employers must compensate nonexempt employees for all hours worked, including work performed remotely. When nonexempt employees are working remotely, there is a risk of their performing “off-the-clock” work—meaning working outside of scheduled work hours. Even reading or responding to an email constitutes work, and if it is occurring outside of regularly scheduled hours, the risk is that it may then result in overtime pay and it may not have been properly recorded which is also a violation of law. Under the FLSA, nonexempt employees are entitled to be paid at 1.5 times their regular rate of pay for each hour worked after working 40 hours in a workweek. **Note** - Some states also require payment of overtime on a daily basis.

## **C. Salary Reductions/Hours Reduction**

Many employers suffering financial hardship during the pandemic may be contemplating whether they need to reduce salaries or hours as they reopen the workplace. Be mindful of the FLSA's requirements as well as state wage/hour laws when making this calculation.

Employers may lawfully lower a non-exempt employee's hourly rate or reduce the number of hours worked (nonexempt employees only need to get paid for hours worked), so long as the employee is earning at least the minimum wage. Employers must be mindful that they will need to pay nonexempt employees the State minimum wage to comply with State wage/hour laws (not just the federal minimum wage which may be lower than the State minimum wage).

One of the legal risks with respect to exempt employees is inadvertently converting them from exempt to nonexempt either by an improper salary or hours reduction or because they are performing nonexempt functions.

In order for an employee to be exempt under the FLSA, they must be paid on a salaried basis, plus they must meet the salary thresholds (\$684/week under the FLSA) *and* they must also meet certain job duties tests that would qualify them for one of the federal “white collar” exemptions from the overtime pay requirements (such as the executive, administrative or professional exemptions). Reductions in the predetermined salary of an exempt employee may cause a loss of the exemption.

However, a prospective salary reduction of an exempt employee may *not* cause a loss of the exemption during a business or economic slowdown, if the change is bona fide and not used as a

device to evade the salary threshold requirements for non-exempt employees. It must be made to reflect long-term business needs rather than short-term, day-to-day or week-to-week deductions. Such a predetermined regular salary reduction, cannot be related to the quantity or quality of work performed, and the employee’s weekly salary must still meet the salary threshold (\$684/week under federal law and whatever salary threshold is set by a state under its wage/hour laws) after the salary deduction. To maintain their exempt status, exempt employees must receive the same weekly salary regardless of the number of hours worked per week, even if they work just a single day in a workweek (plus meet the job duties test under federal and state laws for the particular exemption from overtime pay, as noted above).

Where an employer reduces headcount and decides to cross-train an exempt employee to perform other responsibilities, there is a risk of inadvertent reclassification of an exempt employee to nonexempt if the exempt employee is performing primarily nonexempt duties. That is, the exempt employee—even if earning the salary threshold amount-- could lose his/her “white collar exemption” if no longer meeting the job duties test for that exemption.

#### **D. Compensable Time**

There are questions about whether time spent by employees waiting on line to get their temperatures taken, getting COVID-19 tests, and other health screening is compensable time under the FLSA and/or state wage/hour laws. Employers may decide to pay for this time rather than take a risk that a court later finds in a particular jurisdiction that the time was compensable in an employee class action lawsuit. Because this is uncharted territory, employers should confer with their legal counsel before reaching a determination.

#### **TAKE-AWAYS - What Should Employers Do to Minimize Legal Risks Associated with Wage/Hour Issues and Remote Work?**

- Review and update, where necessary, policies on employee timekeeping, overtime pay, and meal breaks. Implement timekeeping/timetracking software where needed.
- Conduct or refresh managers’ training on employer’s legal obligations under federal, State and local wage/hour laws, particularly as it relates to remote work and the risk of “off-the-clock” work for nonexempt employees, and the need for managers’ to enforce policies prohibiting off-the-clock work, getting advance permission to perform overtime work, and ensuring nonexempt employees are recording all hours worked. Ensure managers understand what time is compensable for nonexempt employees.
- Ensure compliance with federal and State wage laws, particularly if making salary reductions to ensure both salary thresholds are met as well as job duties test to maintain exempt worker classification status for exempt employees. If restructuring any positions, ensure that exempt employees are still primarily performing exempt functions and that job descriptions are updated to reflect that.

## **VI. Furloughs/Layoffs/Salary Reductions**

### **A. Overview**

Because of the COVID-19 pandemic and the resultant state stay-at-home orders, many employers have faced tough financial decisions such as conducting employee reductions-in-force/layoffs which are terminations of employment and all benefits. Alternatively, employers have furloughed a group of employees, which is generally understood to mean, that the employees will not be paid and will not actively be performing services but are still employed, and will return to active status once conditions improve. Another option is where an employer reduces hours and partially furloughs employees to cut costs as noted above. Aside from the wage/hour legal issues implicated above, there are other legal considerations described below.

### **B. WARN Act Notifications**

As employers now reopen the workplace and consider their staffing needs, those considering layoffs, furloughs or reductions in hours for employees should remain mindful of potential legal obligations under the federal Worker Adjustment and Retraining Notification Act (“WARN Act”) or an applicable State’s own “mini-WARN” Act. Specifically, private sector employers with a certain number of employees (see below for employee numbers) are required to give advance written notice to their workers and certain government officials (and union officials) of “employment losses” like terminations, a shutdown, mass layoffs, or reduction of hours. Failure to provide proper notices can result in steep penalties.

#### **1. Federal WARN**

Under the federal WARN Act, employers (whether for-profit or non-profit) with 100 or more full-time workers must provide at least 60 days’ written advance notice to affected employees, State “Rapid Response” coordinators, and certain elected government officials under certain circumstances when there is an “employment loss.” More specifically, WARN generally applies to: 1) closing a facility or discontinuing an operating unit, permanently or temporarily, affecting *at least 50 full-time employees*, at a single site of employment, during a 30-day period; 2) furloughs and layoffs of: a) 500 or more full-time workers at a single site of employment during a 30-day period; b) layoffs of 50-499 full-timeworkers, when the layoffs constitute 33% of the employer’s total active full-time workforce at the single site of employment; or 3) a reduction in hours for 50 or more full-time workers by 50% or more for each month in any 6-month period. The event need not be permanent to trigger WARN.

If a covered employer shut down in March and furloughed employees due to a stay-at-home order, but expected to re-open within six months, and now determines that its financial situation requires continued furloughing through the Fall (past the initial 6 month period) and meets the criteria for an “employment loss,” there may be a WARN Act obligation. A temporary layoff or furlough that lasts longer than 6 months is considered an “employment loss.”<sup>7</sup>

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<sup>7</sup> A temporary layoff or furlough without notice that is initially expected to last 6 months or less but later is extended beyond 6 months may violate WARN unless: 1. The extension is due to business

## 2. State Mini-WARN Laws

Certain States, like New York, for instance, may have their own WARN Act notification requirements. Those requirements may be more stringent than the federal WARN, requiring notification when a fewer number of employees suffers an employment loss, requiring a longer advance notice period than under federal WARN, and imposing additional criteria to avoid steep penalties. For instance, New York's WARN Act requires employers with 50 or more employees to provide 90 days' advance notice of a mass layoff, plant closing, or relocation, where reductions-in-force include as few as 25 employees at a covered "single site."

While the federal WARN Act and some of these state WARN laws may contain an "unforeseeable business circumstance" exception to the length of the notice period, where the event was not foreseeable at the time the notice would have been due (i.e., like a sudden stay-at-home order resulting in job loss), such exceptions do not excuse the requirement of those WARN statutes to provide notice. Employers should confer with their legal counsel in the event they plan to terminate, layoff, furlough or reduce hours of their employees, *before doing so*.

### C. Potential Liability and Damages

An employee may bring an action in court for a federal WARN violation. Employers who fail to comply with the legal obligations of the WARN Act may be liable to employees for back pay and benefits for each day of the violation up to a maximum of 60 days (which is the penalty under New York's WARN Act), plus civil penalties of up to \$500 per day and reasonable attorneys' fees. States will have their own additional penalties for violation of their WARN statutes. Employers covered by both federal and State WARN statutes who fail to comply with both laws may face penalties under each.

### D. Documents That May Bind

Before furloughing, laying off, reducing salary or hours of employees, employers should review any employment agreements to understand the risks if such action were to constitute a breach of contract. Indeed, an employer might not be able to reduce pay without renegotiating the employment agreement. Salary or hours reduction could also impact agreed-upon severance amounts and employee benefits. Employee handbooks with severance policies should also be considered.

Consider too if you have union employees whether the collective bargaining agreement addresses wages, hours, layoff, seniority and bumping rights that may be relevant to decisions to reduce wages, hours, furlough, layoff or recall workers.

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circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and 2. Notice is given when it becomes reasonably foreseeable that the extension is required. An employer may need to prove that it could not foresee the circumstances if it failed to give proper notice and a WARN Act action is brought. There is also a 90-day "look-back" and "look-forward" period for determining the number of employees suffering an "employment loss."

## **E. Benefits Issues**

Furloughing employees or reducing hours may impact an employee's eligibility to continue receiving group health insurance or other benefits. Employers may want to consult with their legal counsel about whether they are able to modify benefit plans or confer with health insurance carriers about the possibility of continuing health insurance for those employees furloughed. Employers should confer with employee benefits counsel on any benefits-related impact of a furlough or layoff. **Note** - A reduction in hours may also mean that an employee is eligible to collect unemployment insurance.

## **F. Immigration/Visa Issues**

Furloughs, layoffs, terminations, or salary reductions may also have legal implications and penalties for an employer who has employees on certain visas like H-1B or H-1B1, or E-3. Employers may want to confer with immigration counsel regarding those issues.

## **G. Leaves of Absence**

If planning a furlough, layoff, or other potentially adverse action affecting employment or pay status, employers should stay mindful about employees on a leave of absence, particularly if it is a job-protected leave taken under the FMLA or FFCRA; leave taken because of a disability, or other leave protected by State or local law. Employers would be well-advised to confer with legal counsel before taking any such adverse employment action against an employee on leave.

## **TAKE-AWAYS - What Should Employers Do to Minimize Legal Risks Associated with Furloughs/Layoffs?**

- Be mindful of potential discrimination issues in connection with such adverse employment actions and document legitimate, nondiscriminatory reasons for such actions taken. Conduct analysis of disparate impact too on any planned staffing changes.
- Be aware of documents that may impact your decisions and binding commitments under employment agreements and collective bargaining agreements as well as severance pay policies.
- Conduct self-audit of pay practices and determine if there are any pay equity issues and address them.
- Ensure compliance with WARN notice obligations as well as state WARN and/or other local notification obligations in connection with a change in worker status.
- Be mindful of any impact on employee benefits or benefits plans that might result from planned furlough or layoffs as well as the impact on employees on visas or a leave of absence.

## **VII. Other Legal Issues Relating to Remote Work**

As noted above, there are wage-and-hour legal risks in connection with remote work which are heightened the longer employees continue to work remotely.

In addition, employers should keep in mind the following when allowing remote work on a long-term basis:

### **A. Preventing Sexual Harassment**

Just as sexual harassment can occur in the physical workplace, sexual harassment can also occur when employees are working from home. Employers and their managers must remain vigilant to prevent sexual harassment wherever and whenever it happens. When the EEOC convened a task force a few years ago to study workplace harassment, it identified a number of factors which may increase the likelihood of a sexual harassment claim. Among those high-risk factors are work environments that are isolated, those that are decentralized and those where alcohol is served or easily available, all of which are potential elements present in remote work environments.

Employees working in the more “casual” home environment may feel less inhibited about acting unprofessionally or inappropriately. Virtual office “happy hours” where employees are drinking alcohol at home may also loosen inhibitions and result in employees making inappropriate remarks to colleagues. Because there is no “on-site” monitoring of remote workers, some workers may feel free to engage in inappropriate conduct, whether on videocalls or through emails and texts.

### **B. Mandatory Labor Postings**

Employers must ensure that employees are still receiving mandatory labor postings while working remotely, which can typically be emailed or mailed to the employee’s home. These include the U.S. Department of Labor’s posting on employee rights under the FFCRA, minimum wage, FMLA, EEO, and other federal, State and local mandatory labor postings.

### **C. Determining Which State’s Law Applies**

An employee working remotely may be viewed as an employee in the State where they physically provide services to the employer, but depending on the particular applicable employment/workplace law, they could be eligible for mandated employee rights or benefits in the state where employer’s operations are located.

### **D. Workers’ Compensation Coverage**

Employers should ensure that their workers’ compensation policies will cover remote work and also determine whether they need to obtain a policy for the state in which the employee is working.

## **E. Payroll Tax Issues**

While an employee working remotely will generally pay taxes to the state where they are physically performing the work, and employers will generally also remit taxes on wages paid to those employees to the same state, even if the employer has no physical presence in that state, that is not always the case. Different states have differing payroll tax withholding filing and registration requirements and employers could face liabilities from not properly withholding taxes or adhering to registration requirements in the states in which their remote employees are performing services. Employers may also have to obtain workers' compensation insurance and/or disability insurance in the state in which the employee is working, and determine whether a particular state's paid sick leave or other laws may be applicable to that employer who may have no presence in the state.

### **TAKE-AWAYS - What Steps Should Employers Take Concerning Remote Workers?**

- Update remote work policies, setting out employer expectations, including availability for meetings, safety of home work space, maintaining confidentiality of company confidential information, maintaining data security, among other things.
- Consider whether to have employees working remotely sign an agreement regarding terms of that remote work arrangement and addressing reimbursement of work expenses, expectations around how to keep company data secured, setting out scheduled hours of work, hours of availability, and availability for videoconferencing, etc. and expectations around safe work space to minimize the risk of workers' compensation claims.
- Continue to hold regular sexual harassment and retaliation prevention training, addressing the risks in the remote work environment and training managers on how to prevent those risks and remind employees to dress appropriately during work calls.
- Update sex harassment policies to address this behavior during remote work specifically and remind employees of your electronic communications policy and its applicability to remote work as well.
- Ensure employees have a clear and effective mechanism to raise concerns and connect with other employees to discuss concerns as well.
- Confer with your accountants regarding tax implications relating to telecommuting employees and your legal counsel on workplace law requirements in the states where remote workers are performing services
- Ensure remote workers receive mandatory labor postings
- Ensure workers' compensation policies cover remote workers

## VIII. Cybersecurity and Employee Privacy Issues

As noted in an earlier Perlman & Perlman LLP [blog post](#), employers may face cybersecurity risks that expose them to potential liability for data breaches and violation of data security laws like New York's SHIELD Act. The risks of data breaches are heightened with more employees working remotely. It is no surprise that computer hackers have increased their activity during the pandemic when many more employees are telecommuting. Employers should take precautions to enhance cybersecurity particularly when employees are working remotely, and implement data security policies and protocols and document retention and destruction policies, and employee training on those policies and protocols, to help minimize legal risk.

Employers who are considering the use of fever-screening, symptom-checking, contact tracing mobile apps, "social distancing wristbands" or other employee-tracking devices should be mindful of what data is being collected and how it is being collected and whether the use of such mobile apps or devices may violate any employee privacy laws or are a subject of mandatory bargaining with a union in a unionized work setting. California's Consumer Privacy Act, for instance (while not applicable to nonprofits), requires employers to provide privacy notices and disclosures about the data collected by them and purpose for collection to employees. Additionally, if employers decide to use mobile apps or other electronic devices for contact tracing or other means of tracking union employees, that kind of surveillance might be a mandatory subject of collective bargaining as well, and employers could face a potential risk of additional unfair labor practice charges from union members.

Furthermore, while some employers may be concerned about whether their employees are appropriately social distancing outside work (and how that behavior will impact others when those employees return to the worksite), employers should be careful about monitoring employees' off-duty activities. Many states protect employees' off-duty conduct, and employers must ensure that any programs or protocols implemented stay within the bounds of those employee legal protections.

## IX. Recap of Important TAKE-AWAYS

There are a multitude of things that nonprofit organizations and for-profit businesses can do at this time to minimize legal risk when considering whether and how to re-open the workplace.

We encapsulate some of them here:

1. If your organization does not believe it can reopen the workplace safely, **DO NOT** reopen at this time; consider allowing remote work indefinitely or on a permanent basis, where feasible
2. Create a COVID-19 taskforce and identify a point person for all employee concerns
3. **If you will re-open, implement various plans** in accordance with CDC, OSHA, State and local public health authority guidance and orders, addressing:

- A risk/hazard assessment of each job and each area of the workspace, examining potential COVID-19 exposures and outlining protective safety/health measures<sup>8</sup>
  - Consider safety/health plan of the building
  - Physical distancing (and interactions between and among staff, clients, visitors, members, volunteers, other building tenants)
  - Providing face coverings<sup>9</sup> and other protective measures for employees, clients, volunteers, customers, and visitors (and replenishing those supplies)
  - Cleaning/disinfecting/hygiene
  - Health screening, monitoring, contact tracing, enforcement of safety protocols
  - Incident response/handling of an employee who contracts COVID-19
  - Business continuity in the event of successive pandemic waves
4. Communication plan with staff, clients, stakeholders on re-opening plan and protocols
  5. If you re-open, consider flexible work arrangements including allowing employees to telecommute
  6. Provide clear and effective mechanism for employees to report safety/health concerns, solicit employee feedback on their sense of safety, improvements that could be made, etc. and address concerns promptly
  7. Review and where needed, update **policies** on such topics as:
    - remote work, leaves of absence, and policies to comply with recently enacted laws like the Families First Coronavirus Response Act, New York State Paid Sick Leave Law, New York State COVID-19 Quarantine Paid Leave Law, Family and Medical Leave Act (and its interplay with emergency paid family leave under the FFCRA)
    - how to request reasonable accommodations (and forms documenting the request and the process taken by the organization to reasonably accommodate)
    - sexual harassment, timekeeping/"off-the-clock" work, return of equipment (when working remotely), data security, data/employee privacy, workers' compensation reporting procedure, employee agreements for remote work

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<sup>8</sup> Some jurisdictions like New York State may mandate employers to create and maintain a written safety plan and affirm to the State they have read and understood the State's re-opening guidance and their obligation to abide by it before re-opening. Employers should communicate the safety plan to employees and may want to post it where employees can see it.

<sup>9</sup> Some jurisdictions, like New York City, may provide some face coverings to small businesses, free of charge.

8. **Renew staff and manager training** on new safety and physical distancing protocols, managers' training on handling requests for reasonable accommodation and leave of absence issues, maintaining confidentiality of medical information (like results of temperature checks), additional training on harassment/retaliation prevention, manager training on wage/hour issues, manager training on employee rights to complain about safety/health and handling complaints, prohibiting retaliation; maintaining data security, OSHA recordkeeping or reporting, etc.
9. If conducting furloughs, layoffs, salary or hours reduction:
  - Document reasons for actions taken and ensure objective criteria and fair and consistent application
  - Assess disparate impact on legally protected groups
  - Determine whether WARN Act notices need to be provided
  - Determine wage/hour and worker classification implications
  - Determine impact on employment agreements, collective bargaining agreements, other agreements, policies, benefits plans, immigration and other issues
10. Determine whether any pay change notices to employees are required in your jurisdiction if adjusting pay or other notices on termination
11. Manage absenteeism and consider cross-training employees to perform essential functions
12. Update job descriptions to reflect any new duties due to restructuring or cross-training (but remain mindful of whether these new duties might inadvertently convert an exempt employee to a nonexempt employee entitled to overtime pay)
13. Document requests for a reasonable accommodation, and the outcome, and the specific bases for the "undue hardship" before denying any such request.
14. Implement mandatory labor postings, emergency paid sick/paid family leave (FFCRA Employee Rights) postings, COVID-19 safety/hygiene/social distancing/face covering postings (and ensure telecommuting employees receive them too)
15. Conduct self-audit pay equity issues (re: disparities based on gender, race, etc.), particularly where making new hires, reducing pay and recalling employees
16. Consider whether to get liability/assumption of risk waivers for negligence claims from volunteers, participants/attendees at events, and anyone entering your premises to minimize risk of personal injury claims (though enforceability may vary depending on the jurisdiction and the waiver language) and offer to host any such event virtually to attendees

17. Consider conducting an employee feedback survey or surveys on matters on which your organization is willing to take action—surveying employees about whether they want to return to the workspace or prefer to continue working remotely, or a short survey that could be done on a weekly basis and another one done to assess more long-term needs to hear what is working well for employees vis-à-vis--communication with staff, updates, safety/health/wellness, leadership, confidence in the organization to address concerns and manage return-to-work, and what things your employees would like to see (more remote work/more or fewer check-ins, specific safety protocols, etc.)
18. Consider how your organization will screen clients, visitors, vendors, and for nonprofits, volunteers who you may be re-engaging, and attendees at events hosted by the organization or business and whether they will do temperature checks and/or COVID-19 testing for anyone entering the premises, to keep their employees safe. Some States—like New York—have authorized businesses to refuse service to anyone entering their premises not wearing a face covering.
19. Before returning to the worksite, consider what your office building/site is doing to keep commercial tenants safe and to notify them if another tenant becomes ill from COVID
20. Review your lease and consult with building management about the safety, cleaning/disinfecting, ventilation improvements, and physical distancing protocols.
21. Consider reputational risk in re-opening too quickly, hosting large events, engaging large numbers of volunteers.
22. Consider attending to your employees' mental health and wellbeing, which may include specific resources (like Employee Assistance Programs), wellness programs and apps, subsidies to pay for childcare and work-from-home expenses, and regular check-ins on their wellbeing.
23. Confer with your employment counsel to ensure your organization is complying with State and local laws in addition to applicable federal law.

**NOTE: *The information provided in this document does not constitute legal advice, and is not intended to substitute for legal counsel.***