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HOT TOPICS: EMPLOYMENT LAW UPDATES DURING THE COVID CRISIS

October 6, 2020

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The material presented here is educational in nature and is not intended to be, nor should be relied upon, as legal or financial advice. Please consult with an attorney or financial professional for advice.

Meet the Speaker



- ▶ **Thomas L. McCally** is an Equity Partner and has over 25 years of experience as a litigator, business advisor, and outside general counsel across a variety of industry groups for nearly every issue in business law and commercial litigation, employment and labor law, complex litigation, class actions, multidistrict litigation (MDL), civil rights, non profit, and religious institutions practice. As the lead Partner for Carr Maloney's Employment and Labor Law Practice Group, Tom regularly represents clients in Federal and State courts as well as before the EEOC and state/local EEO agencies across the Mid-Atlantic region.

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Reopening of the Metropolitan Area

▶ DC - Phase Two

- ▶ Museums – Up to 50 people
- ▶ Restaurants – 50% capacity
- ▶ Retail - 50% capacity



Reopening of the Metropolitan Area

▶ Maryland – Phase Three

- ▶ Gov. Larry Hogan says that all businesses will be able to reopen under phase three.
- ▶ Dare care to open at 100%.
- ▶ Capacity at cinemas and other theaters is capped at 50% or 100 people per auditorium, whichever is less, and everyone must wear a mask, per state guidance.
- ▶ Outdoor venues can put on live performances or show outdoor movies again. Capacity is limited to 50% or 250 people.
- ▶ Houses of worship and retailers can increase their capacity to 75%.
- ▶ Counties and cities can set their own pace for reopening and several have decided to reopen at a slower pace, including Montgomery and Prince George's Counties.

Reopening of the Metropolitan Area

- ▶ **Virginia – Phase Three Summary**
 - ▶ **Expanded business operations**
 - ▶ **Safer at home—especially if you are vulnerable**
 - ▶ **No social gatherings of more than 250 individuals**
 - ▶ **Continued emphasis on social distancing**
 - ▶ **Employers encouraged to continue teleworking**
 - ▶ **Face coverings required in indoor public spaces**

A person with long hair, wearing a white shirt, is sitting at a desk and typing on a silver laptop. The desk is cluttered with various items, including a white mug, a pen, and some papers. The background is a bright, out-of-focus office space with a window and some greenery. A semi-transparent white box is overlaid on the center of the image, containing the title text.

Paid Leave Entitlements During COVID-19

Families First Coronavirus Relief Act (FFCRA)

- ▶ The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19.
- ▶ These provisions apply from April 1, 2020 through December 31, 2020.
- ▶ Possible extension?



FFCRA: Paid Leave Entitlements

- ▶ An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:
 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine related to COVID-19;
 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 4. is caring for an individual who is subjected to an order as described in Number 1 or self quarantining as described in number 2.
 5. is caring for his or her child whose school or place of care is closed (or child-care provider is unavailable) due to COVID-19 related reasons; or
 6. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

DOL Guidance can be accessed here:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

FFCRA: Amount of Paid Leave Entitlements

- ▶ Generally, employers covered under the Act must provide employees:
 - ▶ 100% of pay for two weeks for qualifying reasons #1-3 (employee is in quarantine or experiencing symptoms and seeking a diagnosis), up to \$511 daily and \$5,110 total;
 - ▶ 2/3 pay for two weeks for qualifying reasons #4 and 6 (employee has symptoms or is caring for someone in quarantine), up to \$200 daily and \$2,000 total; and
 - ▶ Up to 12 weeks of paid sick leave and expanded family and medical leave paid at 2/3 for qualifying reason #5 (child-care unavailable/school closed due to Covid-19) for up to \$200 daily and \$12,000 total.
 - ▶ Not eligible for FFCRA leave if parent elects not to send child back to school or day if open.
 - ▶ Leave can be pro-rated if schools are only partially.
- ▶ A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

FFCRA: Eligible Employees

- ▶ In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for paid FFCRA leave.
- ▶ Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional partially paid expanded family and medical leave for reason #5 (child-care unavailable/school closed due to Covid-19).

Employee Rights Under The FFCRA

- ▶ Following an employee's return from FFCRA leave, the employee is entitled to be restored into his or her same or a substantially similar position. Exceptions apply for employers with fewer than 25 employees if certain conditions are met.
- ▶ Employers may not discharge, discipline, or otherwise retaliate against any employee who takes leave under the Expansion Act.

FFCRA: Remedies for Violations

- ▶ The Department of Labor has stated that employers who violate the EFMLA are subject to the same enforcement provisions as the Family and Medical Leave Act.
 - ▶ Back Pay
 - ▶ Front Pay
 - ▶ Liquidated Damages
 - ▶ Attorneys Fees and Costs
 - ▶ Fines and Penalties

Tax Credits

- ▶ Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

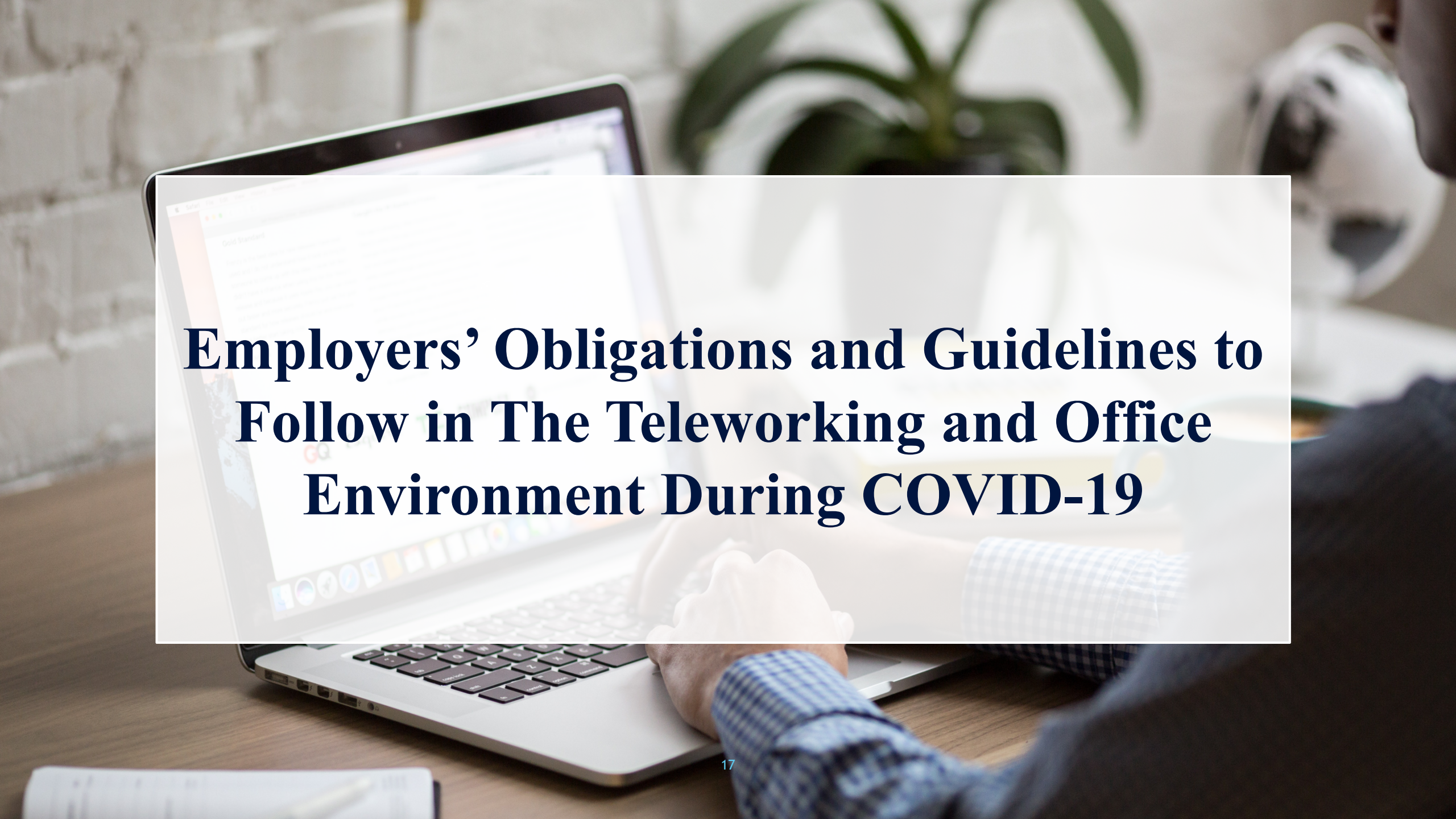
State and Local Paid Leave Laws

- ▶ Many state and local jurisdictions have taken steps to provide additional protections to employees.
- ▶ A number of jurisdictions with existing statutory sick leave laws have expanded those laws to allow employees to take that leave for COVID-19 related reasons or have otherwise provided guidance as to how the law should be applied with respect to COVID-19 related absences.



DC Supplemental Emergency Amendment Act

- ▶ The Act provides that during a period of public health emergency declared by the Mayor, D.C. FMLA applies to all employers, regardless of size and to all employees, regardless of tenure or hours worked.
- ▶ The Act revises the D.C. Sick and Safe Leave Act and mandates that during the COVID-19 emergency, an employer with between 50 and 499 employees that is not a health care provider shall provide paid leave to an employee pursuant for an absence from work due to any of the reasons for which paid leave may be used pursuant to the federal FFCRA.
- ▶ The Act appears to be intended to ensure that employees in the District who qualify for paid leave under the FFCRA (which provides reduced pay in some circumstances and caps the amount of available paid leave benefits) receive full pay for a two week (80 hour) period (or pro-rated amount for part-time employees).
- ▶ The D.C. Supplemental Emergency Amendment Act can be accessed here:
https://lims.dccouncil.us/downloads/LIMS/44543/Signed_Act/B23-0733-SignedAct.pdf

A person wearing a blue checkered shirt is sitting at a wooden desk, typing on a silver laptop. The laptop screen shows a web browser with a document titled 'Gold Standard'. In the background, there is a potted plant and a white dog's head. A semi-transparent white box with dark blue text is overlaid on the center of the image.

Employers' Obligations and Guidelines to Follow in The Teleworking and Office Environment During COVID-19

Remote Work Considerations During COVID-19 Pandemic – Federal Laws that Apply

- ▶ Laws or standards that may apply or apply differently during the COVID-19 pandemic:
 - ▶ Occupational Safety Health Administration (OSHA)
 - ▶ Workers Compensation
 - ▶ Centers for Disease Control (CDC) Guidance
 - ▶ Fair Labor Standards Act (FLSA)
 - ▶ Americans with Disabilities Act (ADA)
 - ▶ Families First Coronavirus Relief Act (FFCRA)
 - ▶ Family and Medical Leave Act (FMLA)
 - ▶ Other laws that continue to apply (like Title VII)

Employers' Obligations under OSHA During the COVID-19 Crisis

- ▶ The Occupational Safety and Health Act of 1970 (OSHA) was passed to prevent workers from being killed or otherwise harmed at work. The law requires employers to provide their employees with working conditions that are free of known dangers.
- ▶ COVID-19 is now a known danger.
- ▶ Employers must take steps to provide a safe working environment and to protect against exposure to COVID-19 in the workplace.
- ▶ Failure to take adequate steps to provide a safe working environment can result in claims of violations under OSHA for failure to provide a safe working environment, as well as “whistleblower” (retaliation) claims if an employee reports concerns and is thereafter retaliated against.

OSHA Claims Related to COVID-19 are Already on The Rise

OSHA Whistleblower Claims Jump Amid Virus, Watchdog Says

By [Vin Gurrieri](#)

Law 360 (August 18, 2020, 10:00 PM EDT)

“Of the 4,100 whistleblower complaints OSHA received from February through May,about 1,600 of them were related to COVID-19, such as claims that someone was retaliated against for claiming violations of guidelines regarding social distancing or personal protective equipment.”

OSHA Claims Related to COVID-19 are Already on The Rise



Amazon Says Virus Safety Claims Are OSHA's Domain
By [Amanda Ottaway](#)
Law 360 (August 12, 2020, 5:38 PM EDT)

Amazon says: “workers who filed a suit claiming the company's Staten Island warehouse conditions pose a COVID-19 risk should take their complaints to the Occupational Safety and Health Administration..”

OSHA's Position on Remote Work During COVID-19:

- ▶ OSHA suggests allowing employees to deliver services remotely if possible during the COVID crisis.
- ▶ Do employers need to worry about the safety of home offices under OSHA?
- ▶ OSHA's compliance directive on home offices is clearly stated:
 - ▶ “OSHA will not conduct inspections of employees’ home offices.”
 - ▶ “OSHA will not hold employers liable for employees’ home offices and does not expect employers to inspect the home offices of their employees.”
 - ▶ “If OSHA receives a complaint about a home office, the complainant will be advised of OSHA’s policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions but will not follow-up with the employer or employee.”
 - ▶ CPL 02-00-125, “Home-Based Worksites” (Feb. 25, 2000).

OSHA's Position on Remote Work During COVID-19:

- ▶ Even though OSHA has stated it will inspect home offices, employers should still take steps to ensure that the employee's home-work environment is safe.
 - ▶ Employees who work remotely are still covered under a variety of other laws that may be impacted by unsafe working conditions at home – such as workers compensation laws.
 - ▶ There is also the possibility of claims by co-workers, clients or other third parties that are injured at the employee's home while conducting work-related business.



OSHA Guidance on Returning to Work During the COVID-19 Pandemic

- ▶ OSHA has issued guidance on what steps an employer should take to ensure that their workplace is safe in light of COVID-19. That information can be found on their [website](#) and is also contained in a booklet created by OSHA.
 - ▶ Generally, OSHA provides:
 - ▶ Perform hazard assessment: Determine where and how workers could be exposed to COVID-19 on the job.
 - ▶ “During all phases of reopening, employers should implement strategies for basic hygiene (e.g., hand hygiene; cleaning and disinfection), social distancing, identification and isolation of sick employees, workplace controls and flexibilities, and employee training that are appropriate for the particular phase.”
 - ▶ Create policies for returning to work after illness or exposure to COVID-19
 - ▶ “Employers should continue to consider ways to utilize workplace flexibilities, such as remote work (i.e., telework), and alternative business operations to provide goods (e.g., curbside pickup) and services to customers.”

Workers Compensation

- ▶ STILL NEED TO WORRY ABOUT WORKERS COMPENSATION ISSUES
 - ▶ 29 C.F.R. § 1904.5(b)(7) states: “Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.”
 - ▶ May want to consider that the employee designate a work area and certify compliance with basic safety measures while conducting work at home.
 - ▶ Employers should require that employees who work remotely report all injuries and illnesses that occur while performing work functions.
 - ▶ Consider prohibiting employees who work remotely from hosting clients, co-workers or other third parties at their home for work purposes.
 - ▶ Check state workers compensation laws.

How the CDC's Guidance Applies to Remote Workers

- ▶ Compliance with CDC and state/local guidelines is a must!
- ▶ Employees who work remotely should certify that they have a safe place to work.
- ▶ Employees should still notify employer if they have symptoms, test positive or have been in close contact with any individual that has tested positive – particularly if they have any contact with clients, vendors, customers or co-workers.
- ▶ Employers should follow [CDC guidelines](#) for employees who report exposure/suspected exposure to COVID-19.

CDC Guidelines

- ▶ What should employers do if an employee who is working remote tests positive for COVID, reports having symptoms of COVID, or reports having been exposed to COVID?
 - ▶ Advise employee to quarantine and seek medical assistance
 - ▶ Advise employee of sick leave policies including the FFCRA
 - ▶ Limit any contact with co-workers, clients or coworkers until appropriate quarantine period has expired
- ▶ What if employee reports that they are capable of working during quarantine period?
 - ▶ Let them continue to work but further limit any risks to others (no exchange of documents, face to face, meetings, etc.)
 - ▶ Failure to allow employee to continue to work remotely may result in claims under the ADA

Issues That Can Arise Under The FLSA and State Wage/ Hour Laws

- ▶ Remote work can lead to claims of failure to pay overtime under the FLSA and state wage and hour laws.
- ▶ Employers must ensure that they are accurately tracking time worked and paying overtime as required by law.
- ▶ Overtime includes work performed before and after work or during scheduled breaks.
 - ▶ Reviewing and responding to emails, calls, texts, virtual meetings, etc.
- ▶ DOL recently issued guidance emphasizing the importance of scheduling work hours. Breaks for child-care or other COVID-related reasons need not be compensated but should be scheduled and documented so that it is clear that no work is expected by employer (and no work is to be performed by employee) during those scheduled break periods.

FLSA – What Should Employers Do?

- ▶ It is expected that there will be a significant increase in Wage and Hour litigation (overtime, docking of pay, paid leave/FFCRA)
- ▶ Implementing effective time keeping methods and communicating importance of reporting all hours worked is critical!
- ▶ Wage and Hour Division of Department of Labor Field Bulletin issued on August 24, 2020 states:
 - ▶ An employer should provide a reasonable reporting procedure for nonscheduled time and compensates employees for all reported hours of work, even hours not requested by the employer. “If an employee fails to report hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.” https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf
- ▶ DOCUMENT, DOCUMENT, DOCUMENT

Americans with Disability Act (ADA)

- ▶ Federal Law- Enforced by EEOC
- ▶ Prohibits discrimination based on disability or “regarded as” disabled
- ▶ Employers must engage in interactive process and provide reasonable accommodation
- ▶ Applies to those with 15 or more employees
- ▶ No limit to time employed



The ADA and COVID-19

- ▶ Those who are vulnerable to Covid-19 may be considered disabled (or “perceived/regarded as having a disability”) under the ADA (and state and local laws).
- ▶ Remote working may be a reasonable accommodation.
- ▶ Be careful not to assume accommodations are wanted by or necessary for the employee (avoid discrimination because of a perception that the employee is disabled).
- ▶ Additional accommodations may be necessary even for remote workers.
 - ▶ Access to files/documents
 - ▶ Access to adequate technology and resources

The ADA and COVID-19

- ▶ What should employers do?
 - ▶ Review job descriptions to ensure that they accurately reflect the essential functions of the job.
 - ▶ If a job or job function cannot be performed remotely, make sure that is clear from the job description.
 - ▶ No “magic words” needed to put employer on notice of “disability” or potential need for “reasonable accommodation”
 - ▶ Engage in the interactive process.
 - ▶ Request that any employee who has concerns about their particular circumstances (with respect to working during the COVID-19 pandemic) advise employer and work with the employer to see if any reasonable accommodations can be made without undue hardship to employer.
 - ▶ Requests for accommodations related to family members may not fall within the ADA but may trigger other laws (FMLA/FFCRA).
 - ▶ If any requested accommodation is denied, document the reasons (show why it is not reasonable or would pose undue hardship).

A close-up photograph of a person's hand clicking a white computer mouse on a wooden desk. A semi-transparent white rectangular box is overlaid on the image, containing the title text in a dark blue, serif font. The background is slightly blurred, showing a computer monitor and a desk lamp.

Other Issues That Might Arise From Remote Working and How Employers Should Manage

Other Issues That Arise With Remote Working

- ▶ Childcare issues – telework is generally not a substitute for childcare.
 - ▶ Review and revise policies regarding remote work – specifically addressing child-care issues.
 - ▶ Example: “Teleworking is not a substitute for child-care, and employees who are permitted to telecommute must make appropriate arrangements for child-care needs during working hours.”



Remote Working and Childcare During COVID-19

- ▶ Many employees at all levels have children that are home due to COVID-19.
- ▶ Daycare centers may be closed, and schools may be virtual.
- ▶ Employers must be flexible and creative.
 - ▶ Consider implementation of company wide policy prohibiting calls/virtual meetings during specified times (lunch) to accommodate remote workers who are home with school aged children due to school closures.
 - ▶ Make sure all breaks are scheduled and that employee is relieved of all duties during breaks related to childcare (FLSA/overtime).
 - ▶ Make sure all time worked is recorded accurately.
 - ▶ Remember – if remote working with children home is not feasible, the employee is entitled to take FFCRA leave.

Other Issues That Arise With Remote Working

- ▶ Be mindful of the FFCRA, the FMLA and other federal or state expansions of benefits.
 - ▶ DC Supplemental Emergency Act and Emergency Amendment Act – extends protections of DCFMLA and revised the DC Sick and Safe Leave Act



What Should Employers Do?

- ▶ Review Employment Policies
 - ▶ Advise Employees that all policies are still in effect when working remotely.
 - ▶ Ensure Compliance with EEO and Sexual Harassment Policies and remind workers of the need to report concerns about discrimination or harassment.
 - ▶ More casual environment may lead to more claims. Be vigilant!
 - ▶ Conduct virtual EEO training (emphasizing policies prohibiting discrimination and sexual or other illegal harassment).
 - ▶ Make sure employees know how to reports/ claims/concerns virtually.
- ▶ Remind employees of overtime policies and take action to ensure compliance with FLSA as well as state and local wage and hour laws.
- ▶ Advise employees who are working remotely to report any injury or illness that occurs while performing work functions remotely (consistent with on site policies).
- ▶ Make sure all required notifications of rights under new laws (such as the FFCRA) have been provided to employees and “posted.”
- ▶ Consider creating virtual HR site where all required notices can be posted and accessed by employees

What Should Employers Do?

- ▶ Review Job Descriptions – Review for virtual work, make changes as necessary. If position requires employee to be in the office, the job description must say it!
- ▶ Continue performance reviews and document any performance deficiencies.
- ▶ Explore alternatives for onboarding, teambuilding, accountability and building corporate trust
 - ▶ Virtual Group Events (are these really effective?).
 - ▶ Updating technology and making sure employees have what they need to work remotely.
 - ▶ Ensuring availability for real time conversations/timely responses.
 - ▶ Open communications - Stop problems before they start.
 - ▶ Document issues as they arise.

Return To Work Considerations

- ▶ Compliance with regulations regarding return to work guidance.
 - ▶ CDC Pamphlet and fact sheet offers guidance
 - ▶ <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/returning-to-work.html>
 - ▶ <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>
 - ▶ Explore flexible work arrangements (staggered shifts, alternate on site work-days)
 - ▶ Keep in mind the importance of being able to contact trace (set up work groups)
- ▶ OSHA concerns (safe place to work)
 - ▶ Clean work-stations
 - ▶ Limit common use of work areas, phones and equipment
 - ▶ PPE
 - ▶ Landlord obligations (ventilation and common areas)
 - ▶ Hand washing stations/sanitizers

Return To Work

- ▶ What to do if an employee tests positive, has symptoms, or has had close contact with someone who has tested positive
 - ▶ FOLLOW CDC GUIDELINES!!!! Constantly review CDC Guidance as it is constantly updated and changes frequently.
 - ▶ State/local laws/ regulations: Stay up to date and in compliance
 - ▶ Ex. DC requires quarantine for people returning from “hot spots.” If employees traveled to a “hot spot” must quarantine before being allowed back to office.
 - ▶ Failure to follow guidelines might be used as evidence against employer in litigation.
- ▶ Keep apprised of changes in law or policy, including state and local guidance/ current reopening phase.
- ▶ Remember the ADA.
- ▶ Remember FFCRA and FMLA- ensure proper notification is given of rights, and track all leave taken.
- ▶ Implement effective time keeping methods and communicate importance of tracking all time worked.

What if an Employee Refuses to Return to Work?

- ▶ When an employer reopens and requests employees to return to work, some employees may refuse to do so for various reasons. Employers must be cautious about implementing “one size fits all” rules. Employers should consider the following:
 - ▶ Why is the Employee refusing to return to the work site?
 - ▶ Has the Employee been permitted to take/exhausted FFCRA leave? FMLA leave?
 - ▶ Is the Employee covered under the ADA? Is the employee requesting any accommodations?
 - ▶ Is the Employee refusing to return to the work site out of a generalized fear of contracting Covid-19?

What if an Employee Refuses to Return to Work? FFCRA Considerations

- ▶ Is the employee eligible for FFCRA?
 - ▶ Return to work of furloughed employees who have not taken FFCRA may result in an employer being required to offer FFCRA to employees who have qualifying reasons (child-care, for example).
- ▶ Has the employee already been working remotely? Employers may be required to provide FFCRA to employees if they revoke teleworking (if the employee has FFCRA leave available and has a qualifying reason).
- ▶ Did the employee previously request or take FFCRA?
 - ▶ Be wary of potential claims of retaliation.

What if an Employee Refuses to Return to Work? ADA Considerations

Is the request due to a reason that would require accommodations under the ADA? Is the employee at “higher risk for severe illness” if they get COVID-19?

- ▶ Who is at higher risk?
 - ▶ CDC Guidance says:
 - ▶ Older Adults
 - ▶ People with certain medical conditions are at increased risk:
 - ▶ Cancer
 - ▶ Chronic kidney disease
 - ▶ COPD (chronic obstructive pulmonary disease)
 - ▶ Immunocompromised state (weakened immune system) from solid organ transplant
 - ▶ Obesity (body mass index [BMI] of 30 or higher)
 - ▶ Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
 - ▶ Sickle cell disease
 - ▶ Type 2 diabetes mellitus

What if an Employee Refuses to Return to Work? ADA Considerations

- ▶ According to the CDC, the following conditions might be at an increased risk for severe illness from COVID-19:
 - ▶ Asthma (moderate-to-severe)
 - ▶ Cerebrovascular disease (affects blood vessels and blood supply to the brain)
 - ▶ Cystic fibrosis
 - ▶ Hypertension or high blood pressure
 - ▶ Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
 - ▶ Neurologic conditions, such as dementia
 - ▶ Liver disease
 - ▶ Pregnancy
 - ▶ Pulmonary fibrosis (having damaged or scarred lung tissues)
 - ▶ Smoking
 - ▶ Thalassemia (a type of blood disorder)
 - ▶ Type 1 diabetes mellitus

What if an Employee Refuses to Return to Work? ADA Considerations

- ▶ EEOC Guidance is confusing and internally inconsistent.
 - ▶ Smoking and age are not usually “medical conditions” and are not “disabilities.”
- ▶ EEOC Guidance is not necessarily binding; Courts have often overruled EEOC guidance on other issues.
- ▶ Nonetheless, Employers should still be mindful of CDC/EEOC guidance and how the ADA may apply during the Covid-19 pandemic.
- ▶ Note that there may be different considerations under the ADA under different scenarios:
 - ▶ Employee requests for accommodation versus Employer restrictions on Employee's ability to resume normal job functions due to risk factors.
 - ▶ Be cautious of making employment decisions based upon perception of risk to the Employee.

What if an Employee Refuses to Return to Work Due to Generalized Fear?

- ▶ Some employees who do not fit into any protected category (ADA, FFCRA, etc.) may still refuse to return to the work site due to generalized concerns about workplace safety during the global pandemic.
- ▶ Employers must still assess risk before taking any adverse employment action.
 - ▶ Would adverse action give rise to claims of retaliation under OSHA? Under the FFCRA/FMLA?
 - ▶ Is there any evidence of disparate treatment (for example, other similarly situated employees are allowed to continue to work remotely).
 - ▶ Is it really necessary for the employee to return to the work site?
 - ▶ Consider alternative work arrangements such as working off hours when fewer or no other employees at the work site or a graduated return to work arrangement to ease the employee's fears.
 - ▶ Use some time to document and establish that the arrangement is not working out or to demonstrate why there is a need for return to the work site for that individual.

6 Tips For Employers Tackling Post-Virus Telework Requests

By [Anne Cullen](#)

Law360 (September 23, 2020, 3:42 PM EDT)

- ▶ Reexamine Any Past Opposition to Telework
- ▶ Record the Telework Experience during Covid
- ▶ Don't Bank on an 'Undue Hardship' Defense
- ▶ Be Clear If In-Person Attendance Is 'Essential'
- ▶ Avoid One-Size-Fits-All Remote Work Policies
- ▶ Don't Assume Telework Is the Only Solution



Questions?

If your question does not get addressed within the time allotted for the webinar, please reach out to our presenters with any additional questions.

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Carr Maloney's Upcoming Events and Resources

Carr Maloney's COVID-19 Resource Hub

With the rapid growth of COVID-19, the laws and rules of employment matters are constantly evolving and changing. Carr Maloney's Employment and Labor Practice Group is here to provide useful resources for employers on how COVID-19 is affecting various aspects of employment law and how different jurisdictions are addressing the outbreak.

There will be new governmental measures each day. Employers should consult with counsel for the latest developments and updated guidance on this topic. Carr Maloney P.C. is open for business and our attorneys are available to consult by client's preference of communication whether it be email, phone, or video chat. Please feel free to reach out to our Employment and Labor Practice Group partners with any questions during this time.

[Visit COVID-19 Resource Hub](#) | [Sign up for email notices](#)

[Visit Carr Maloney's Insights Page for up to the date announcements, webinars, and podcasts](#)