

ALABAMA NAVIGATING THE COVID-19 CONUNDRUM IN THE WORKPLACE TODAY

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Navigating the waters of federal laws and regulations is hard enough for well-established issues, which are continually developing. Because COVID-19 is a tsunami in a sea whose tides consistently change as we learn new information, it is difficult to stay ahead of the wave and keep informed about current workplace rights and responsibilities.

This article is intended to give the reader a brief overview of rights and obligations of employers and employees who are navigating the still-novel world in the times of COVID-19. It is not possible to outline every contingency or all situations. Your rights and responsibilities may differ if you are a public employer or employee and depending on the size of your workforce. It is strongly recommended you seek the advice of a knowledgeable labor and employment attorney to guide you through the maze of the alphabet soup of federal laws discussed herein if you have concerns or questions.

The Families First Coronavirus Response Act (“FFCRA”) mandated paid leave and protections for employees who were affected by COVID. Although the tax break to employers for permitting the paid leave to employees was extended through September 30, 2021, the employees’ leave entitlements expired on December 31, 2020. Thus, employers may voluntarily provide

paid leave through the FFCRA and receive dollar-for-dollar tax credits for the payments; however, it is no longer required. Unless the entitlements are extended beyond September 30, 2021, or another bill is passed providing for paid leave and protections for COVID-related leave, employees of employers with less than 50 employees (and employers who do not voluntarily extend FFCRA benefits in exchange for tax credits) will be at the mercy of their employers’ internal leave policies. Employers with 50 or more employees are subject to the Family Medical Leave Act (“FMLA”), which provides qualified employees with up to 12 weeks of unpaid leave and protections from retaliation for exercising leave rights for serious health conditions or to care for a family member who has a serious health condition.

On January 29, 2021, the US Department of Labor (“USDOL”) issued new Occupational Safety and Health Act (“OSHA”) guidance to mitigate and prevent the spread of COVID in the workplace. The guidance, available at www.osha.gov/coronavirus/safework, recommends employers develop and implement a COVID prevention program with the following elements: (i) a hazard assessment, (ii) measures that limit the spread of COVID in the workplace, (iii) ensure infected or exposed workers are separated and removed from the workplace, and (iv) protect employees who raise COVID concerns from retaliation.

The guidance outlines further recommendations for employers related to physical distancing, physical barriers if physical distancing is not possible, face coverings, ventilation, supplies for good hygiene, and routine cleaning and disinfecting. It also recommends employers provide reasonable accommodations to high risk individuals (which is also required by the Americans with Disabilities Act, discussed below), enhanced cleaning/disinfecting after suspected or confirmed COVID infection, and following CDC guidelines for returning infected individuals to the workplace.

The guidance reminds employers they are required to record work-related cases of COVID if there is a confirmed COVID case that is work-related and involves relevant recording criteria, and must follow all regulatory requirements when reporting COVID fatalities and hospitalizations to OSHA. Additionally, OSHA prohibits discrimination or retaliation against an employee who complains about or reports an infection or exposure to COVID-19, and OSHA regulations prohibit discrimination against an employee for reporting a work-related illness.

Although OSHA does not have a COVID-specific standard, all employers are required to provide a safe and healthful workplace free from recognized hazards that can cause serious physical harm or death.

Employers must also be aware of protections afforded to employees under the National Labor Relations Act ("NLRA") for certain protected and concerted activities, which may include inquiries, complaints, and requests related to working conditions.

The Americans with Disabilities Act ("ADA") generally places restrictions on employee medical testing, which includes taking an employee's body temperature, and asking medical related questions. However, the EEOC has provided guidance explaining employers are permitted to measure an employee's temperature, and ask questions about COVID-related symptoms and potential exposure to COVID because it will help them determine if an employee would pose a direct threat to health in the workplace. If an employee refuses to have her temperature taken or answer questions regarding symptoms, exposure, or diagnosis, an employer can bar the employee from physical presence in the workplace. The ADA requires that all medical information obtained must be kept confidential under the ADA.

Employers are prohibited by the Genetic Information Nondiscrimination Act ("GINA") from asking employees medical questions about family members, but does not prohibit employers from asking employees whether they have had contact with anyone diagnosed

with COVID or displaying symptoms of COVID.

Employers are also required to conduct an individualized assessment to determine if a reasonable accommodation is available for an individual with a disability who is at higher risk from COVID and requests an accommodation to eliminate possible exposure. Employers must engage in a dialogue with the employee to determine whether a reasonable accommodation is available that will not cause an undue hardship in the employer. The employer may ask questions to determine whether the condition is a disability, discuss how the requested accommodation will assist the worker and enable her to keep working, explore alternative accommodations that may meet her needs, and request medical documentation if needed. Employers can also require employees receive the COVID vaccine before returning to the workplace. However, if an employee has a disability (under the ADA) or sincerely held religious belief (under Title VII of the Civil Rights Act) that prevents her from receiving the vaccine, the employer must engage in a dialogue to determine whether a reasonable accommodation is available.

All in all, employers and employees faced with workplace COVID issues must consider myriad federal laws and regulations, in addition to any state and local orders and guidelines, in determining their rights and responsibilities. Navigating these waters can be difficult without an experienced labor and employment attorney at the helm.



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¹The guidance is not a standard or regulation and therefore does not create legal obligations. It provides recommendations and explanations of mandatory safety and health standards already in place. Other existing OSHA standards for protecting workers from infection include: requirements for personal protective equipment, respiratory protection, sanitation, protection from bloodborne pathogens, and employee access to medical and exposure records.

² The CDC issued its own guidance for Businesses and Employers related to COVID, which are available at www.cdc.gov/coronavirus/2019-ncov//community/guidance-business-response.html