



Navigating Labor and Employment Issues During and After the COVID-19 Pandemic

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Agenda

Part I Returning Employees to the Workplace

Accommodations

Refusal to Return

Screening

COVID-19 Vaccine

Part II Employees in the Workplace

Monitoring Compliance

Leave Options

Additional Considerations

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Part I

RETURNING EMPLOYEES TO THE WORKPLACE

The Return to Work

- How should you notify employees that they will be returning to work?
 - Provide a written directive
 - Survey employees
 - Develop a process to handle employee questions and requests for accommodation
- Can employees make accommodation requests in advance of their physical return to work?
 - Yes
 - *EEOC Q&A G.6*



Requests for Accommodation

- Determine whether the employee's condition is a disability
- Discuss how the requested accommodation would assist the employee and enable him/her to continue working
 - Does the accommodation pose an undue hardship (significant difficulty or expense)?
- Explore alternative accommodations that may effectively meet the employee's needs
 - Employers have the discretion to choose among "effective accommodations"
- Request medical documentation if needed
- *EEOC Q&A Section D*




Requests for Accommodation

- Is the condition a disability?
 - Employee is at higher risk of severe illness from COVID-19 or has comorbidities
 - Mental health condition due to COVID-19 v. pre-existing mental health conditions
 - An employee with a preexisting mental illness/disorder that has been exacerbated by the pandemic may be entitled to a reasonable accommodation
 - *EEOC Q&A D.2*
 - Family member is at higher risk of severe illness from COVID-19

Engaging in the Interactive Process

- What accommodation(s) is the employee requesting?
 - ✓ Telework
 - ✓ Limited physical interactions with coworkers, clients, customers, others
 - ✓ Staggered start/end times
 - ✓ Different entrances and exits available to employees
 - ✓ Additional PPE (N95 masks, gloves, barriers, etc.)



1. Why is an accommodation needed?
2. What accommodation(s) meets the employee's health concerns?

Engaging in the Interactive Process

- What if there is limited time to engage in the interactive process?
- *EEOC Q&A D.7*
 - Temporary accommodations
 - Accommodations with end dates
 - Leave options
- Continue to monitor and follow up with the employee
 - Use direct supervisors
 - Request follow up medical notes as appropriate

Employee Refusal to Return to Work

What is the employee's reason?

- Does he/she have any protection under the law?
- Have all options been exhausted?
- Should you issue a directive to report to work?
- OSHA (Occupational Safety and Health Act)

29 C.F.R. 1977.12

- Employer failed to eliminate the danger
- Good faith – genuine belief that imminent danger exists
- Real danger of death or serious injury
- Urgency



Employee Screening

- Disability-related inquiries and medical examinations
- *EEOC Q&A A. 1-5*
 - Screening questionnaire
 - Temperature checks
- What can I ask my employees?
- What CAN'T I ask my employees?

Employee Screening

● Can I test employees for COVID-19?

● Can I test employees for antibodies?

● What if an employee refuses to complete the questionnaire or get tested?

COVID-19 Vaccine

Can I require all employees to get vaccinated?

- Pre-vaccination medical screening
- Employees who are unable to due medical reason
 - *Hustvetv. Allina Health Sys.*, 910 F.3d 399, 409 (8th Cir. 2018)
- Employees who refuse due to a religious practice/belief
 - *Edwards v. Elmhurst Hosp. Center*, 2013 WL 839535 (E.D.N.Y. 2013)

Part II

EMPLOYEES IN THE WORKPLACE






Monitoring Compliance

- Screening
 - Questionnaire
 - Temperature checks
- Employee Conduct
 - Activities outside of the workplace
Legal Activities Law, N.Y. Lab. Law § 201-d(1)(a)
 - Travel advisory
New York Executive Order 202.45, June 24, 2020

Monitoring Employees

- Workplace restrictions (mask wearing, social distancing, cleaning/disinfecting areas, etc.)
- Workplace exposure
- Employee showing symptoms or confirmed exposure
- Handling reports of potential exposure
- Confidentiality of medical information

Leave Options

-  Families First Coronavirus Response Act (FFCRA)
-  New York Paid Sick Leave for COVID-19
Chapter 25 of the laws of 2020
-  New York Paid Sick Leave
N.Y. Labor Law § 196-b
-  Family and Medical Leave Act (FMLA)
29 U.S.C. 2601 et seq
-  Other Paid or Unpaid Leave Options

American Rescue Plan

- Proposed FFCRA extension
- Extend leave obligations through Sept. 30, 2021
- Expanded to large employers
- Provide “over 14 weeks” of combined sick and family leave
- Minimum payment \$1400 per week

New York COVID-19 Paid Sick Leave

- A mandatory or precautionary order of quarantine or isolation due to COVID-19 means an order issued by the State of New York, the Department of Health, local Board of Health, or any other government entity authorized to issue an order due to COVID-19.
- Employers cannot require an employee to use up accrued sick leave before using emergency paid sick leave.
- An employee taking Paid Sick Leave must be restored to his or her same position when he or she returns to work.

New York COVID-19 Paid Sick Leave

- Public employers must provide an employee subject to an order of quarantine or isolation with at least 14 days of paid sick leave
 - Full pay for employee's regular work hours
- New York State Department of Labor (NYSDOL) recently issued guidance expanding leave entitlements

Eligible for First Use of COVID PSL if...	Eligible for Second Use of COVID PSL if...	Eligible for Third Use of COVID PSL if...
Employee ordered to quarantine without a positive test result OR Employee has tested positive and ordered to isolate	Employee has tested positive and ordered to isolate	Employee has tested positive and ordered to isolate

New York COVID-19 Paid Sick Leave

- NYSDOL Guidance Highlights:
 - Employees may be entitled to up to **three** paid leaves of absence under the guidance
 - **LIMITATION:** Second and third leaves are not available unless: (1) employee actually tests positive for COVID-19 and (2) submits documentation confirming positive test
 - Negative test is not required to return back to work following quarantine/isolation

New York COVID-19 Paid Sick Leave

- Exceptions:
 - Employee voluntarily traveled in violation of the current travel advisory
 - Employee is not actually subject to an order of quarantine or isolation
 - The employee is deemed asymptomatic or has not been diagnosed with any medical condition and is able to physically work or work remotely

New York COVID-19 Paid Sick Leave

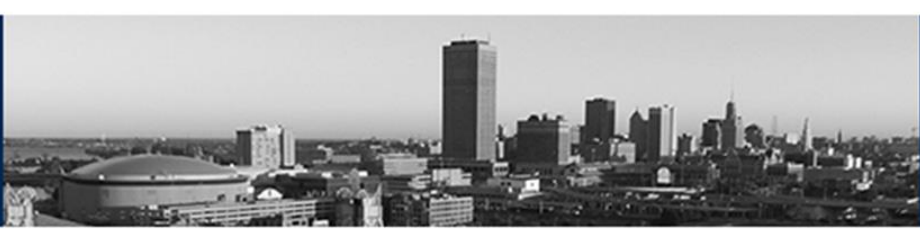
- NYSDOH Guidance provided an additional entitlement
 - Continuation of regular rate of pay if employer directs employee's absence due to exposure or potential exposure, regardless where exposure may have occurred
 - Only required if employee is not otherwise subject to an order of quarantine or isolation

FMLA Leave and COVID-19

- FMLA coverage for COVID-19-related situations
- COVID-19 diagnosis is not a serious health condition
- FMLA available if employee's COVID-19-related condition satisfied definition of serious health condition

U.S. DOL Field Bulletin 2020-8 (Dec. 29, 2020)

- DOL approved telemedicine for in-person treatment under FMLA
- No FMLA to avoid exposure
- No FMLA for quarantine
- No FMLA for school closures



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Practice Areas

- Employment Law (Management)
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- School Law
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Education

- State University of New York at Buffalo Law School, J.D. (magna cum laude)
- John Carroll University, B.A. (cum laude)

Admitted to Practice

- New York State
- District Court for the Western District of New York
- State of Ohio
- District Court for the Northern District of Ohio
- Sixth Circuit Court of Appeals

Prior Experience

- Jones Day (Cleveland)
- Volunteer Law Clerk for the Honorable Judge William Skretny, United States District Judge for the Western District of New York

Professional Associations

- Leadership Buffalo, Class of 2019
- Erie County Bar Association (Labor Law Committee)
- Women's Bar Association of the State of New York – WNY Chapter
- New York State Bar Association
- UB Law Alumni Association, GOLD (Graduates of the Last Decade) Board of Directors
- Organization of Public Employer Negotiations
- Ronald McDonald House Charities of Western New York Young Professionals Group



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Education

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New York State
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Professional Associations

Erie County Bar Association
National School Boards Association Council of School Attorneys
New York State Association of Management Advocates for School Labor Affairs
New York State Association of School Attorneys
New York State School Boards Association

Authorities and Reference Materials

- Americans with Disabilities Act (ADA) and Rehabilitation Act, 42 U.S.C. 12101, et seq.
- Health Insurance Portability and Accountability Act (HIPPA), 42 U.S.C. 1320d et seq.
- Executive Orders, *New York Executive Order 202.45, June 24, 2020*
- Families First Coronavirus Response Act (FFCRA)
 - Emergency Paid Sick Leave Act (EPSLA), FFCRA, Division E, §§ 5105 to 5111 (Pub. L. No. 116-127)
 - Emergency Family and Medical Leave Expansion Act (EFMLEA), FFCRA, Division C, §§ 3101 to 3106 (Pub. L. No. 116-127); 29 U.S.C. § 2620
- Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq.
- New York Paid Sick Leave Law, N.Y. Lab. Law § 196-b
- New York Paid Leave for COVID-19, Ch. 25 of the laws of 2020
- Legal Activities Law, N.Y. Lab. Law § 201-d(1)(a)
- OSHA Regulation, 29 C.F.R. 1977.12, “Exercise of any Right Afforded by the Act”



Authorities and Reference Materials

- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, EEOC, 2009, updated March 21, 2020.
- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, EEOC, 2009, updated Dec. 16, 2020.
- 2019 Novel Coronavirus (COVID-19) Interim Containment Guidance: Precautionary Quarantine, Mandatory Quarantine and Mandatory Isolation Application to All Local Health Departments NYSDOH
- President Biden's American Rescue Plan, available at https://buildbackbetter.gov/wp-content/uploads/2021/01/COVID_Relief-Package-Fact-Sheet.pdf.
- U.S. Department of Labor Field Assistance Bulletin No. 2020-8 (Dec. 29, 2020)

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