

After the COVID-19 Pandemic: Planning Now for The Return to Occupancy

**Presented by Cozen O'Connor
for the**

Florida Restaurant & Lodging Association

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OPENING UP AMERICA AGAIN

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

Guidelines For All Phases - Employers

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

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

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

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

RE-OPENING TIMELINE

No telling at this point when, where, and what.

Reopening will be jurisdiction specific and *industry specific*

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

— **Dr. Deborah Birx**

Pay close attention to local orders and regulations.

You may be able to open business in one jurisdiction but not another.

Regulations and orders may change from jurisdiction to jurisdiction

SOCIAL DISTANCING

Develop social distancing plans

Some jurisdictions require social distancing guidelines to be in writing

Even if not required, can reassure employees who fear returning to work

Each physical location may have different needs and requirements

Factors to consider:

1. Physical workspace modifications
2. Limiting in-person interactions and physical contact
3. Training regarding social distancing policies, who to report to for questions and concerns
4. Updates to employee schedules
5. implementing regular screening protocols
6. Providing PPE
7. Cleaning and disinfecting

PHYSICAL WORKSPACE CHANGES

Some things to think about . . .

- Adding partitions
- Only opening certain areas of work stations, kiosks, desks, etc.
- Modifying high-touch surfaces such as door-knobs, clock-in areas
 - Is there an app that can be used?
- Display reminder signs regarding social distancing
- Staggered meal breaks
- Less in-person meetings

Planning to Reopen: *Recall Communications*

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



Planning to Reopen: *Recall Refusal Ramifications*

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





Planning to Reopen:
Health Screening and Testing

Planning to Reopen: *Health Screening and Testing*

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

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

Planning to Reopen: *Health Considerations*

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

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

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



Planning to Reopen: *Temperature Check Best Practices*

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

Planning to Reopen: *COVID-19 Symptom Inquiries*

- Employers can inquire about COVID-19 symptoms
 - During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus.
 - Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.
 - For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, sore throat, new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting
 - Employers should not inquire about symptoms unrelated to COVID-19
 - Ideally, Human Resources should make all such inquiries rather than the employee's supervisor
 - Employees should be sent home if they exhibit COVID-19 symptoms at work or instructed to stay home if the employee calls in and reports COVID-19 symptoms
 - The Company should following CDC guidance and applicable state and local orders once a presumed or positive COVID-19 case is reported

Planning to Reopen:
OSHA COMPLIANCE



OSHA

There is no specific federal OSHA standard covering COVID-19.

- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

Basic Infection Prevention Measures

- Promote frequent hand washing by employees and guests, e.g., reminder signs (multiple languages to broaden guest communication).
- Provide alcohol-based hand-free rubs/swipes containing at least 60% alcohol in public areas, e.g., vending / ice machines on hotel floors.
- Encourage employees to stay home if they are sick.
- Encourage respiratory etiquette, including covering coughs and sneezes (multiple languages).
- Provide tissues and additional trash receptacles in public areas.
- Discourage employees from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Remove / reduce customer service phones in common areas.
- Increase length of time between vacancy and cleaning rooms.
- Giving out condiments upon request, instead of leaving them at the table.

Hygiene and Environmental Safety

Cleaning of visibly dirty surfaces followed by disinfection is the best practice measure for prevention of COVID-19.

Perform additional environmental cleaning on all frequently touched areas, such as front desk, elevator banks, coffee stations, doorknobs, etc.

CDC – No additional disinfection beyond routine cleaning is recommended at this time.

Products with EPA-approved emerging viral pathogens claims are expected to be effective against COVID-10 based on data for harder to kill viruses. Ensure use for linens / laundry.

https://www.epa.gov/sites/production/files/2020-03/documents/sars-cov-2-list_03-03-2020.pdf



Social Distancing for Restaurants – The Impossible Challenge?

Ray Washburne, member of President Trump's Intelligence Advisory Board to reopen the economy:

Social distancing isn't practical for restaurants.

The economics just don't work. We're either all in or we're not, because half of one restaurant is just a money loser.

Keeping restaurant workers and customers at a safe distance would be difficult to enforce.

Social Distancing (within 6 feet – employee / guests)

- Limiting capacity to 50%.
- Eliminate or limits on number of participants for conferences/meetings/banquets.
- Space seating at least 6 feet apart (signs and floor markings).
- Staggering of employee schedules on both a shift and work week basis.
- Staggering of employee breaks to minimize social interaction.
- Tightening of restrictions on visitors or off-duty employees in workplace.
- Room service restrictions, e.g., delivery only to door.
- Closure of pools and gyms.
- Reduce / eliminate housekeeping services, e.g., deliver requested items to door.
- Post signage encouraging guests / patrons to stay home if they feel ill and to utilize delivery.

Social Distancing Cont.

- Eliminate / reduce in-person check-in or checkout with automated process.
- Use of chatbot or similar platforms for guest communication / customer service.
- Ipads, etc. for ordering / tipping (contactless ordering).
- Encourage guests to utilize Apple Pay, Google Pay, etc. to limit cash transactions.
- Transition continental breakfast to “grab and go” format.
- Temporary discontinue buffets / salad bars.
- Request guests / patrons to minimize direct contact with employees.
- Deferred dine-in options (gift cards).

-Clear Guest Communication-

-State and Local Orders-



U.S. Food and Drug Administration

<https://www.fda.gov/food/food-safety-during-emergencies/best-practices-retail-food-stores-restaurants-and-food-pick-updelivery-services-during-covid-19>

- Managing Employee Health (including contracted workers)
- Personal Hygiene for Employees
- Managing Operations in Foodservice Establishment or Retail Food Store
- Managing Food Pick-Up and Delivery

OSHA Employee Hazard Assessments

Classifying Worker Risk Level Based on Job Tasks: Very High, High, Medium, Lower

Most hospitality employees will likely fall in the lower exposure risk (caution) or medium exposure risk levels depending on duties, location and other fact specific considerations.

Medium: Frequent or close contact with people who may be infected but who are not known or suspected COVID-19 patients, e.g., in areas with ongoing community transmission, contact with travelers who may return from international locations with widespread transmission.

Low: Jobs that do not require contact with people known to be, or suspected of being infected nor frequent close contact with them.

OSHA Requirements and Safety Concerns

Lower Exposure Risk:

Follow “Steps All Employers Can Take to Reduce Workers’ Risk of Exposure to SARS-coV 2.”

- Monitor public health communications recommendations and ensure employees have access to information
- Collaborate with workers to designate effective means of communication lines

OSHA Requirements and Safety Concerns

Medium Exposure Risk:

- Install physical barriers such as clear plastic sneeze guards when feasible.
- Keep guests / patrons informed about symptoms and ask them to minimize contact with employees.
- Limit guests and public's access to worksite or restrict access to only certain areas, e.g., use of signage to designate pick-up areas and social distancing guidelines.
- Communicate availability of medical screening other employee health resources, e.g., on-site nurse, telemedicine services.

Medium Exposure Risk

Employees with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles, e.g., housekeeping.

PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.

Potential job categories in risk level may include front desk and housekeeping.

Front desk / Cashiers : Consider plastic shield guards.

Rising Issue : Masks/PPE

Walmart to deploy temperature checks, masks and gloves to all employees nationwide

BY SOPHIE LEWIS
MARCH 31, 2020 / 12:45 PM / CBS NEWS



SCIENCE \ HEALTH \ CORONAVIRUS \

CDC recommends people wear cloth masks to block the spread of COVID-19

Surgical masks and N95 respirators should be reserved for health care workers

By Nicole Wetsman | Apr 3, 2020, 5:48pm EDT

NEWS

Greg Abbott Promised to Get Masks for Texas. Many Doctors Say They Are Still Facing Shortages.

Family care physicians say they still don't have enough personal protective equipment. So they're seeking other solutions.



CDC Guidelines v. OSHA Requirements

CDC now recommends individuals wear cloth masks when out “in public settings where other social distancing are difficult to maintain (e.g. grocery stores and pharmacies) especially in areas of significant community based transmission.”

OSHA is not requiring cloth masks (yet) under the General Duty clause, but once they become available, it may be hard for employers to justify not providing masks to employees whose jobs require interaction with the public and distancing is not possible. Expecting further guidance soon.

Respirators/N95 masks should be left for healthcare professionals and require training under OSHA standard.

Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission





Personal Protective Equipment

Key Consideration

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

Federal Guidance

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



Personal Protective Equipment Cont.

- Can you require an employee to wear a mask?
 - According to the EEOC, Yes. “An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.”
 - OSHA: Can it be worn safely? Chefs – working over a stove? Pre-existing breathing issues?
- What if an employee wants to wear a mask?
 - When possible, employers should allow employees to wear masks and should only deny mask use if there is a business necessity or safety reason to deny mask use.
 - The new norm?
 - Back of the House v. Front of the House? Fast Food?
 - State and Local Laws may require the use of face masks, e.g., earlier this month, Miami Mayor mandated that all visitors and workers inside restaurants must wear masks or face coverings at all times.



Face Masks

- Who pays for this?
 - Some states (California, New York, New Jersey) specifically require employer's to provide essential face coverings at their expense
 - No current guidance from OSHA or DOL regarding face coverings *provided they are used for source containment only*.
 - General PPE standards still mandate that PPE required by the employer be supplied and paid for by the employer (e.g. surgical masks in an operating room).

- Who cleans it?
 - Absent state specific rules, employers are recommended to add a cleaning stipend or an in-house cleaning program.

- Upcoming OSHA guidance?

SYMPTOMATIC GUESTS IN HOTELS

- State Law Considerations
- Generally, if business has a reasonable belief that the guest poses a safety risk to the other guests and staff, it may refuse to accommodate the guest.
 - Ensure management is involved by instructing staff to escalate if they have guests with symptoms checking in.
 - Inform guest that you would like to accommodate them, but you have concerns about the health and safety of other guests and staff. Direct them to the nearest medical facility.
 - Ensure second staff member present as a witness if deny check in.
 - Refund the guest, if the reservation was pre-paid.
 - The manager should prepare written statements after-the-fact explaining what happened and why they believed the guest posed a health risk.
 - Disinfect the surfaces where the guest might have touched after they leave.

REMEMBER ADA – PUBLIC ACCOMODATION ISSUES!

New OSHA Recordkeeping Guidance

COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if the case:

Is confirmed as a COVID-19 illness;

Is work-related as defined by 29 CFR 1904.5; and

Involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

Unless in a specific identified industry, OSHA will not enforce recordkeeping requirements to make work-relatedness determinations for COVID-19 cases, except where: (1) There is objective evidence that a COVID-19 case may be work-related; and (2) The evidence was reasonably available to the employer.

Local Health Department

Consult with the local and county health departments to determine appropriate actions if a guest, patron or worker presents symptoms of COVID-19 disease, as well as how to respond if asked to quarantine guests for hotels.

Public health officials at the state, federal, and local level may have the legal authority to implement control measures to prevent the spread of communicable disease, such as isolation and quarantine, travel restrictions, and medical treatment.

A public health emergency can be declared by state (e.g., the governor or state public health officer) or federal (Secretary of Health and Human Services) authorities, may allow for actions like property confiscation for use in response or emergency approvals for unapproved drugs. This includes restricting movement within a hotel and placing a quarantine on a hotel property.

Managing Your Workforce: *New Claims of Discrimination*



Rise in Traditional Discrimination Claims

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

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

1. Elderly individuals.

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

Discrimination Against Covid-19 Victims

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

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

Discrimination Against Covid-19 Victims

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

For current employees who test positive for Covid-19, there are a number of available causes of action for discrimination or retaliation under ADA, FMLA, FLSA (Paid Sick Leave under Families First Act) and applicable state laws.

Although technically, discipline for engaging in prohibited behavior is different from discipline for being sick or absent, this is almost certainly likely to be challenged, and would require an actual policy be in place and enforced consistently. Many states also have laws prohibiting discipline against employees who engage in “lawful off duty activity.”

Immunity Discrimination Theories

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

Best Practices to Avoid Discrimination Claims

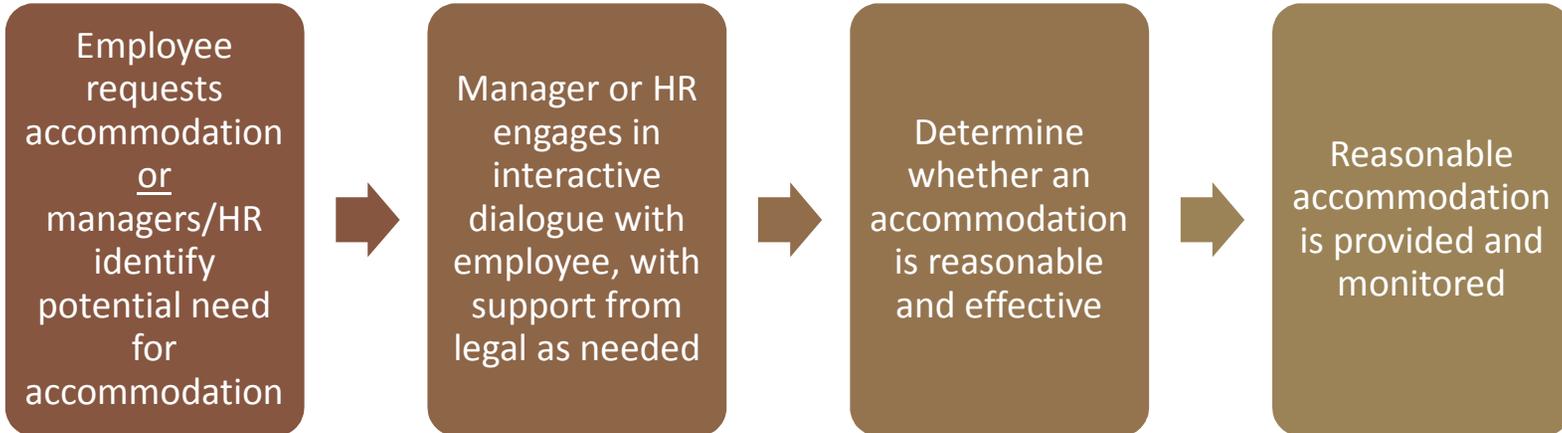
1. Train managers on permissible subjects for job interviews – it will be hard to avoid discussion of Covid-19 and that will lead down a dangerous path.
2. Any and all testing or medical inquiries should be done in accordance with ADA guidelines, be job related and applied consistently. Create a written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

Managing Your Workforce: *Reasonable Accommodations*

JENNIFER T. WILLIAMS



Overview of the ADA Process



Preparing for Return to Work Accommodation Requests

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

Eastern Airlines Accused Of Firing Exec Over COVID-19 Leave



By [Danielle Nichole Smith](#)

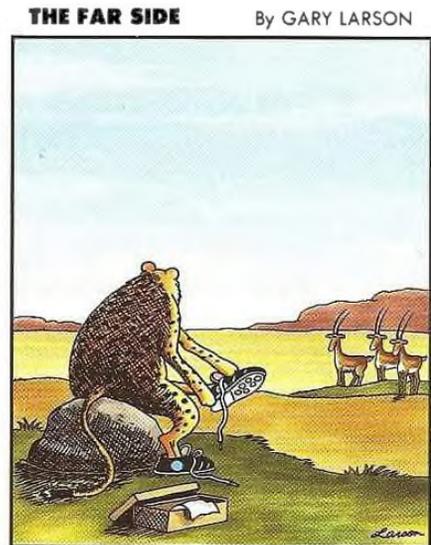
Law360 (April 16, 2020, 8:26 PM EDT) -- A former director at Eastern Airlines hit the company with a suit in Pennsylvania federal court Thursday, claiming she was fired for trying to take time off under the Families First Coronavirus Response Act, a law Congress recently passed to address the COVID-19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

Attached Documents

[Complaint](#)

Useful Tools & Links

[Add to Briefcase](#)



Managing Your Workforce: *New Problems to Consider*

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

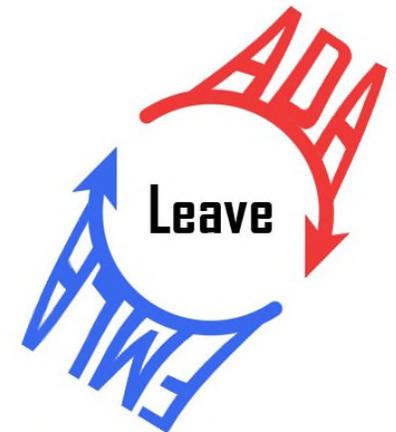
- Has your industry shifted?
- Has the focus of your business shifted?
- Have the essential functions of a job changed?
 - physical requirements (*e.g.* teleworking)
 - Reallocate some previously essential job duties
 - Eliminate previously essential job duties

- Does your business still intend to rely upon pre-Coronavirus essential functions?



“Essential” vs. “Non-Essential”

- Written Job Descriptions
 - If the answers to any of these questions are “Yes” – it is important to update your job descriptions accordingly for ADA accommodation purposes, BUT:
 1. employers do not have to remove essential job functions;
 2. return to work certifications (as with all medical exams/inquiries) have to be job-related and consistent with business necessity
- Also under FMLA, essential job functions can impact both the employer’s RTW certification and “substantially equivalent” position



Managing Your Workforce: *New Problems to Consider*

A NEW ERA OF REASONABLE ACCOMMODATION REQUESTS:

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



Managing Your Workforce: *Requests for PPE*

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

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

Managing Your Workforce: *Extended Leave*

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



Managing Your Workforce: *Mental/Emotional Disabilities*

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

Managing Your Workforce: *Continued Teleworking*

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

Managing Your Workforce: *Accommodation Best Practices*

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



Questions?

Employment Law Now Podcast:

<https://www.employmentlawnow.com/author/mike-schmidt/>

OSHA Blog:

<https://www.oshachronicle.com/>