



PROGRAM MATERIALS

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Navigating the “New Normal”: Considerations for Employers During the “Re-opening” Phase of the Covid-19 Pandemic

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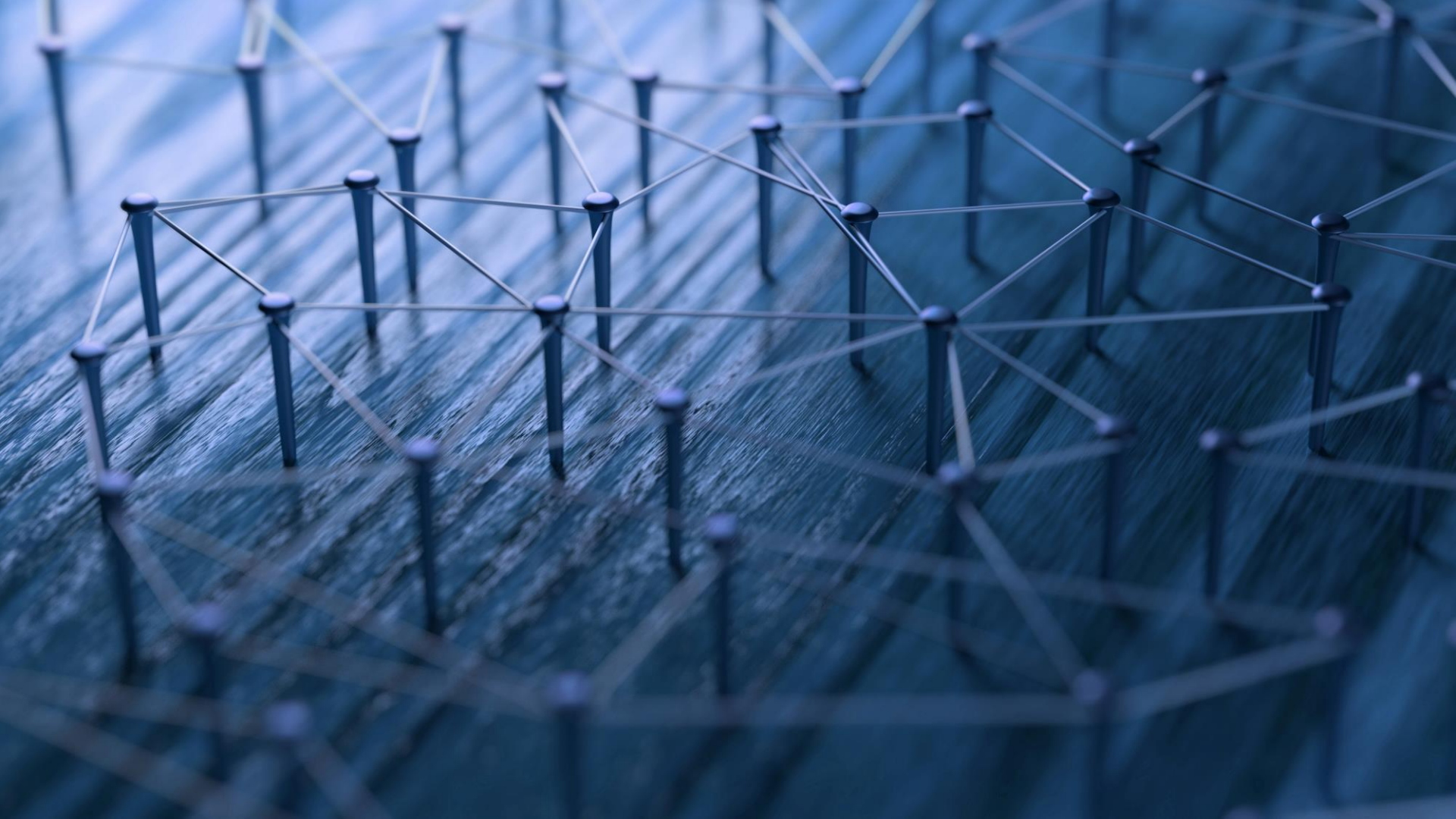
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NAVIGATING THE “NEW NORMAL”: CONSIDERATIONS FOR EMPLOYERS DURING THE RE-OPENING PHASE OF THE COVID-19 PANDEMIC

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DEVELOPING A PLAN TO REOPEN

- ☐ Identify a COVID-19 workplace coordinator.
- ☐ Follow any CDC and OSHA guidelines for the workplace.
- ☐ [Update leave policies.](#)
- ☐ Consider screening.
- ☐ Create or update an emergency communication and response plan.
- ☐ Continue remote work where possible.
- ☐ Consider PPE and other precautions.
- ☐ Minimize face-to-face interactions.
- ☐ Eliminate unnecessary travel, meetings, conferences, workshops, and training sessions.



WORKPLACE REOPENING PARTNERSHIP



Employers must be diligent in implementing a proper reopening protocol



Employees must invest in and own their part in the reopening protocol

WORKPLACE RESPONSIBILITY

State specific requirements: Utah example

Include a mitigation plan for risk of resurgence

Protective measures for the most vulnerable

Provide reminders:
Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.

WORKPLACE MITIGATION STRATEGIES

(BY LEVEL OF COVID-19 PRESENCE IN COMMUNITY OR WORKPLACE)

None to Minimal	Minimal to Moderate	Substantial
<ul style="list-style-type: none"> • Know where to find local information on COVID-19 and local trends of COVID-19 cases. • Know the signs and symptoms of COVID-19 and what to do if staff become symptomatic at the worksite. • Review, update, or develop workplace plans to include: <ul style="list-style-type: none"> » Liberal leave and telework policies » Consider 7-day leave policies for people with COVID-19 symptoms » Consider alternate team approaches for work schedules. • Encourage employees to stay home and notify workplace administrators when sick (workplaces should provide non-punitive sick leave options to allow staff to stay home when ill). • Encourage personal protective measures among staff (e.g., stay home when sick, handwashing, respiratory etiquette). • Clean and disinfect frequently touched surfaces daily. • Ensure hand hygiene supplies are readily available in building. 	<ul style="list-style-type: none"> • Encourage staff to telework (when feasible), particularly individuals at increased risk of severe illness. • Implement social distancing measures: <ul style="list-style-type: none"> » Increasing physical space between workers at the worksite » Staggering work schedules » Decreasing social contacts in the workplace (e.g., limit in-person meetings, meeting for lunch in a break room, etc.) • Limit large work-related gatherings (e.g., staff meetings, after-work functions). • Limit non-essential work travel. • Consider regular health checks (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings (if feasible). 	<ul style="list-style-type: none"> • Implement extended telework arrangements (when feasible). • Ensure flexible leave policies for staff who need to stay home due to school/childcare dismissals. • Cancel non-essential work travel. • Cancel work-sponsored conferences, tradeshows, etc.

ASSESS WORKFORCE NEEDS: STEP 1

People aged 65 years and older.

People who live in a nursing home or long-term care facility.

People with chronic lung disease or moderate to severe asthma.

People who have serious heart conditions.

People who are immunocompromised including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications.

People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease.

People who are pregnant should be monitored since they are known to be at risk with severe viral illness, however, to date data on COVID-19 has not shown increased risk.

ASSESS WORKFORCE NEEDS: STEP 2





REVIEW AND UPDATE LEAVE POLICIES

What kind of leave fits your organization?

Does the Families First Corona Virus Response Act (FFCRA) apply to your business?

If yes: adopt new procedures for the application of emergency FMLA and Paid Sick Leave

If no: consider more flexible leave

Avoid Retaliation

ADA compliance

FMLA compliance (yes it still applies!)

PPP loan considerations: implement tracking procedures and documentation in order to get loan forgiveness

CREATING A SAFE WORKPLACE FOR EMPLOYEES

Create safety training for returning employees and communicate with employees clearly and often regarding safety precautions and procedures

Wear masks.

Clean and disinfect the things you touch.

Wash your hands often with soap and water for at least 20 seconds. Use hand sanitizer with at least 60% alcohol if soap and water are not available.

Avoid touching your eyes, nose, and mouth with unwashed hands.

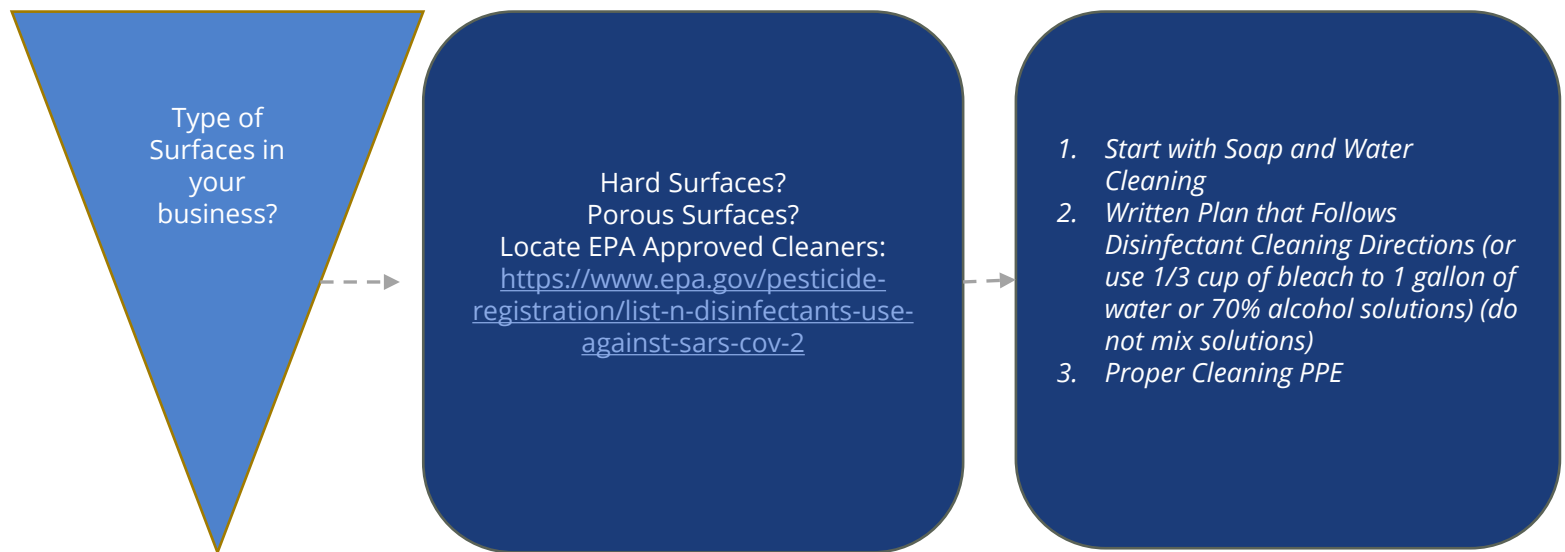
Cover your mouth and nose with a tissue when you cough or sneeze or use the inside of your elbow. Throw used tissues in the trash and immediately wash hands with soap and water for at least 20 seconds. If soap and water are not available, use hand sanitizer containing at least 60% alcohol. Learn more about coughing and sneezing etiquette on the CDC website.

Clean AND disinfect frequently touched objects and surfaces such as workstations, keyboards, telephones, handrails, and doorknobs. Dirty surfaces can be cleaned with soap and water prior to disinfection. To disinfect, use products that meet EPA's criteria for use against SARS-CoV-2, the cause of COVID-19, and are appropriate for the surface.

Avoid using other employees' phones, desks, offices, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.

Practice social distancing by avoiding large gatherings and maintaining distance (approximately 6 feet or 2 meters) from others when possible.

CLEANING CONSIDERATIONS



CLEANING CONSIDERATIONS

High Traffic Areas – Clean At Each Use

- doorknobs
- light switches
- countertops
- handles
- desks
- phones
- keyboards
- toilets
- faucets and sinks
- gas pump handles
- touch screens
- ATMs
- shopping carts
- POS keypads
- iPads or other screens used for communication

CLEANING CONSIDERATIONS

Other Areas



CREATING A SAFE WORKPLACE FOR EMPLOYEES: EMPLOYEE SCREENING

Implement testing policies & procedures for employees to ensure that no one is coming into work with a fever or when feeling ill (the EEOC has, as of late April 2020, stated that employers can take the temperature of employees or require a COVID-19 test before allowing works to return to the workplace)

Consider having a daily routine where employees are asked if they have any COVID-19 symptoms

Immediately send home any employees that have COVID-19 symptoms

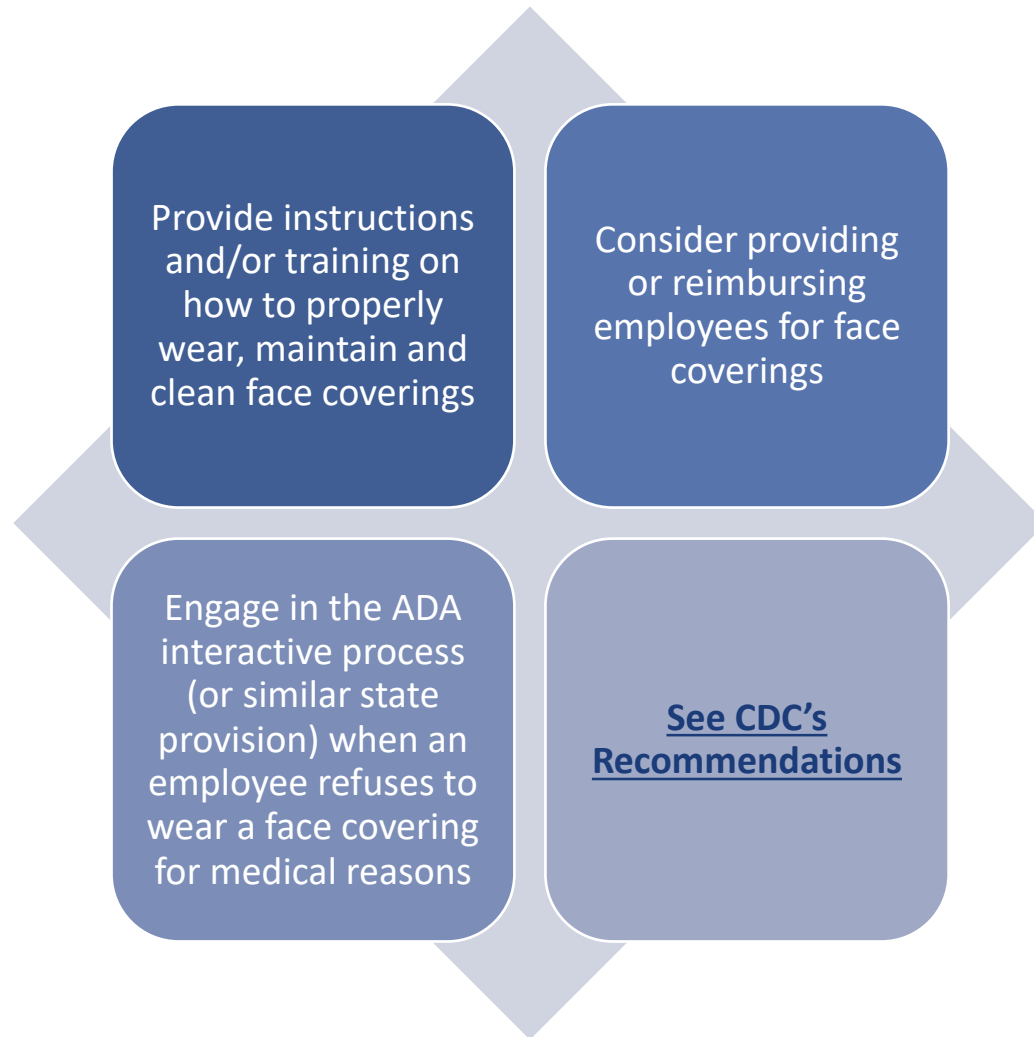
Ensure all screening and communications are confidential

Limit the number of employees designated as screeners and ensure their safety

Avoid questions that might reveal other non-COVID-19 related health issues. Know exactly what questions you can ask.

Determine how the company will handle employees that refuse to be screened (consult counsel before disciplining employees)

CREATING A SAFE WORKPLACE FOR EMPLOYEES: FACE COVERINGS



CREATING A SAFE WORKPLACE FOR EMPLOYEES

- Encourage employees to check themselves for symptoms and stay home when not feeling well
- Create an action plan if employee becomes sick or tests positive for COVID-19
 - If employee is sick or displays COVID-19 symptoms during work, immediately separate that employee from others and send home
 - Close off areas used by ill employees and disinfect areas per CDC cleaning recommendations found [here](#)
 - Refer to the [CDC guidance](#) on cleaning and disinfecting areas of potential COVID-19 exposure
 - Follow [CDC](#) and local guidance for when an employee can return to work; the EEOC has authorized employers to require a return to work fitness for duty medical notation
 - Determine if you need to inform [OSHA](#) or other public health agency
 - Investigate; Modify Staffing; Confidentiality
 - See [Holland & Hart COVID-19 Resource Site](#) – Workplace Safety Tab and general [CDC guidance](#)



BEST PRACTICES FOR SOCIAL DISTANCING & WORKPLACE HYGIENE

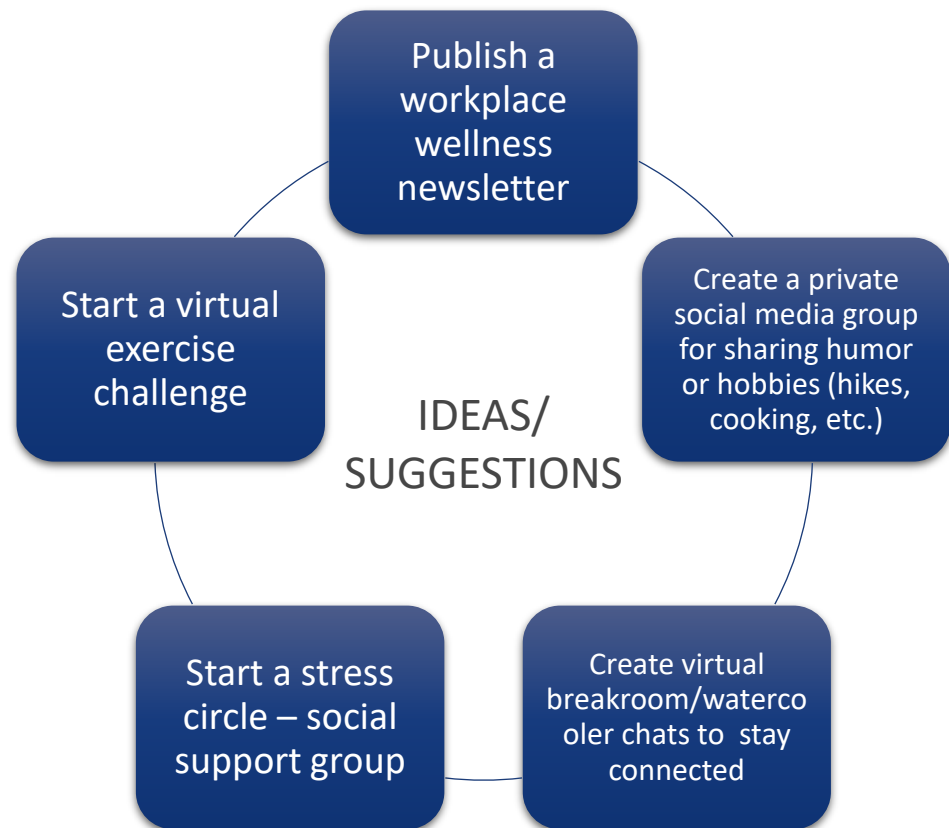
- Retain or offer work-from-home options whenever possible
- Consider alternating shifts and changed hours to reduce employee headcount and crossover in the workplace
- Limit number of in-person meetings and also the number of people allowed during these in-person meetings
- Limit non-employee visits and create a visitor and vendor questionnaire assessing health and travel
- Limit or restrict gatherings in public and common areas
- Request employees to routinely clean and sanitize their personal workstations
- Rearrange workspaces to maximize appropriate social distancing
- Restrict movement between departments, floor, and/or functions
- Increase ventilation and amount of outdoor air used by the HVAC system
- Limit the number of individuals in elevators and suggest appropriate spacing
- Provide intermittent breaks for hand washing
- Provide no-touch disposal receptacles and distribute tissues and hand sanitizers throughout multiple locations
- Discourage use of any contact methods of greetings
- Stagger breaks and lunches
- Where possible, keep doors open to reduce point of contact
- Limit the number of customers on premises and provide visual markers on floors for six-foot distancing

SAFE WORKPLACES FOR EMPLOYEES

- ✓ [Holland & Hart Coronavirus Resource Site](#)
- ✓ [Whitehouse Guidelines for Reopening](#)
- ✓ State Guidelines for Reopening: [Utah Example](#)
- ✓ Local Health Department Resources: County based
- ✓ [CDC Resources](#)
- ✓ [OSHA Resources](#)
- ✓ [EEOC Resources](#)

EMPLOYEE WELLNESS

- Manage Employee Stress
 - Constant communication with employees letting them know what the company is doing to protect their health and safety
- Designate an employee or department to be a wellness champion that focuses on improving the health and culture within the workplace, promotes wellness programs and events, and assists in the coordination, planning and implementation of wellness initiatives and programs



EMPLOYEE WELLNESS – RULES OF ENGAGEMENT

- ✓ NLRA allows complaining
- ✓ Etiquette rules should be provided
- ✓ Follow the golden rule
- ✓ No inappropriate content

The Golden Rule
TREAT OTHER PEOPLE THE
WAY YOU WOULD LIKE TO
BE TREATED
WITH RESPECT



EMPLOYMENT LAWS AND MITIGATING EMPLOYMENT RISKS

EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (NLRA)

NLRA (29 USC § 151 et seq.)

- Protects employees' rights to engage in:
 - Concerted activity
 - Complain about working conditions
 - Improve working conditions
- Concerted protected activity during the COVID-19 pandemic
 - Two or more employees discussing safety concerns, with each other, or speaking with their employer about improving workplace conditions.
 - An employer should proceed with caution in evaluating potential consequences related to an employee or employees' refusal to work at this time.



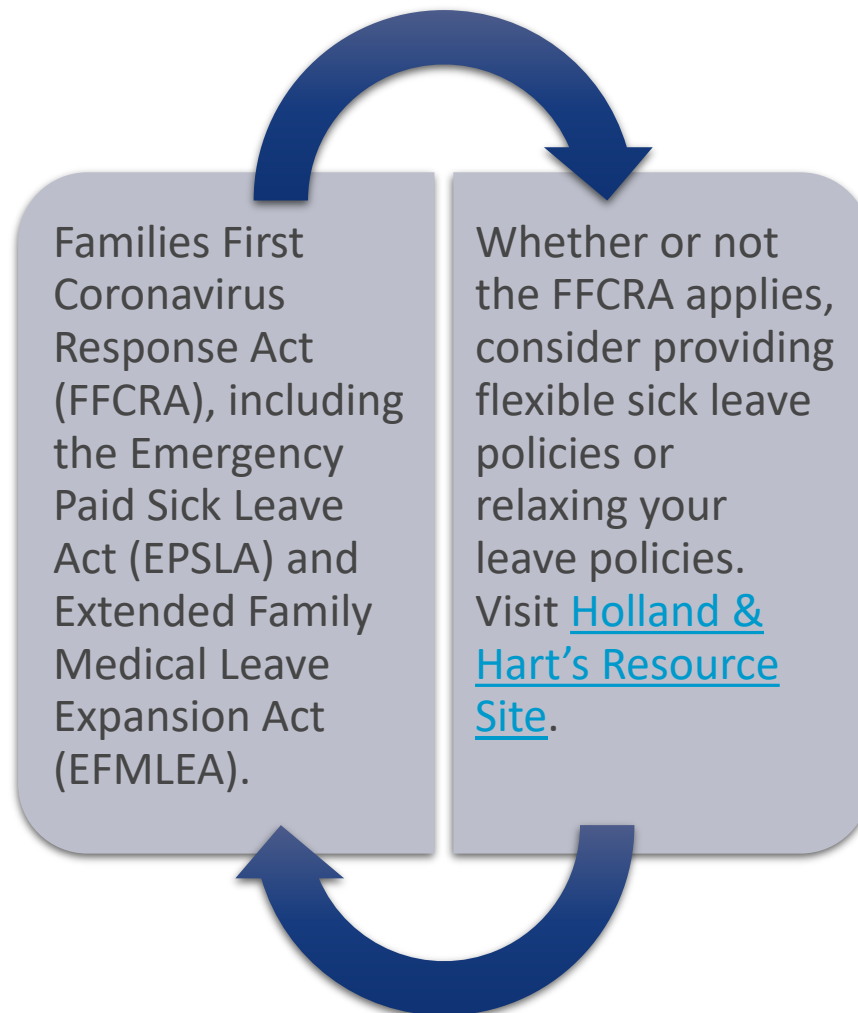


NAVIGATING EMPLOYEE RIGHTS UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)

ADA (42 U.S.C. § 12101 et seq.)

- Screening – proper as long as consistent with advice from CDC and public health authorities ([according to EEOC](#))
- Avoid disclosures of medical information, even if related to COVID-19
- Maintain medical information, including screening or temperature logs, as confidential and separate from personnel files
- Working from home might be considered a reasonable accommodation and employer should consider this option during the interactive process (If employees have been conducting work from home, denying a request for accommodation to work from home may be more difficult and employers should update and review job descriptions to demonstrate why working in the workplace is a business necessity)

COVID-19 LEAVE LAWS





NAVIGATING EMPLOYEE RIGHTS UNDER FEDERAL OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

OSHA (29 USC §651 et seq.)

- General duties clause - requires that employers provide “employment and a place of employment which are free from recognized hazards that are causing or likely to cause the death or serious physical harm to [its] employees.”
 - “[A]s a general matter, there is no right afforded by [OSHA] which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.” (See 29 CFR §1977.12(b)(1)).
- Employer right to correct. Employee right of inspection – section 8(f) of OSHA.
- The mere existence of COVID-19 is not sufficient.
- OSHA workplace evaluation tool: <https://www.osha.gov/Publications/OSHA3990.pdf>
 - Details the steps it recommends that employers can implement to best manage the risk of exposure for most vulnerable very high risk to lower exposure risk.
- Always check your state’s local OSHA laws and guidance.

DISCRIMINATION CLAIMS

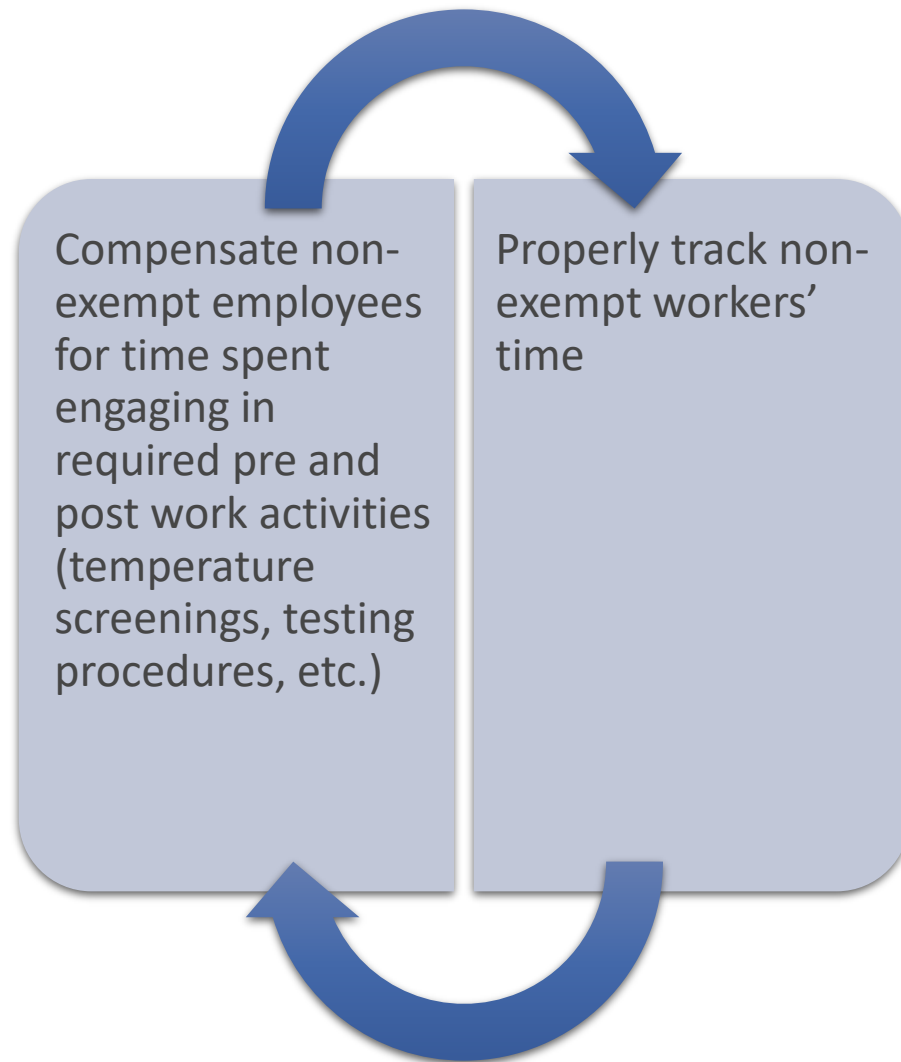
Do not make any hiring or firing decisions based on the applicant's or employee's:

- (1) vulnerability status for COVID-19 (State and local ordinances may possibly have specific definitions and special rules for "vulnerable" individuals);
- (2) reasonable accommodation requests;
- (3) leave requests pursuant to FMLA/FFCRA

If downsizing, consider consulting an attorney to help with a disparate impact analysis

Always utilize objective decision-making criteria for recalling or terminating employees

FLSA WAGE CLAIMS



HARASSMENT CLAIMS



WHISTLEBLOWER ACTION PLAN

- Ensure that company has an action plan if a COVID-19 whistleblower scenario arises



WARN ACT LIABILITY

- The WARN Act requires a minimum of 60 days' written notice to employees and governmental authorities and union representatives before any mass layoffs affecting more than 50 employees in a single site of employment
- Class actions for alleged WARN Act violations have already commenced (*Hooters Restaurants and Velodyne Lider*)
- Citing COVID-19 alone may not be sufficient to establish a WARN Act exception to liability
 - Document attempts at other cost-cutting measures short of termination
 - Document direct financial impact of COVID-19 on your operations
 - Clearly state reason why 60 days' advance notice could not be provided
 - The federal WARN Act does not apply to temp layoffs lasting less than 6 months, keep track of the length of employee furloughs
- Check for “mini-WARN” Act laws in your state (Analyze applicable state mini-WARN laws and whether the state has modified its law to allow a WARN Act exception (i.e. California's executive order; NY State Dept of Labor guidance on exceptions to government-mandated closures resulting from pandemic)

NAVIGATING EMPLOYEE RIGHTS UNDER THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

- Genetic Information Nondiscrimination Act (42 U.S.C. § 2000ff-1 et seq.)
 - Is a COVID-19 test result genetic information? Yes! (including positive, negative, and antibody results)
 - Applies to all terms and conditions of employment from hiring to fringe benefits
 - Applies to the employee and family medical history
 - May not be used to make an employment unless related to the individual's current ability to work (ADA allows) (FMLA has limited availability)
 - COVID-19 related:
 - You may require
 - body temperature
 - Symptom screening
 - Negative test to return to work
 - Health care provider
 - certification
 - information to evaluate FMLA, EPLA, and EFMLEA
 - Information to evaluate reasonable accommodation under the ADA
 - You may request a test if written informed consent is obtained



WHAT IS CONSENT FOR COVID-19 RELATED TESTING UNDER GINA?

- Acquisition of genetic information is prohibited except in narrow circumstances. Related to COVID-19 testing:
 - 202(b)(2)(B) – “the employee provides prior, knowing, voluntary, and written authorization[.]”
 - 202(b)(3) – “ where an employer requests or requires family medical history from the employee to comply with the certification provisions of [the Family and Medical Leave Act (FMLA)] or [equivalent] State family and medical leave laws[.]”



CONFIDENTIALITY OF GENETIC INFORMATION UNDER GINA

■ Records

- All forms and data **must** be maintained separate from personnel and other files (206(a))
- Store with other medical files
- Treat as a confidential medical record
- ADA compliance = GINA compliance (e.g. maintain in a separate medical file)

■ Disclosures allowed

- To the employee if the employee makes a written request (206(b)(1))
- To an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under the Code of Federal Regulations
- Pursuant to Court order – but only as narrowly tailored in the Court order (206(b)(3))
- Government investigators (206(b)(4))
- Consistent with the FMLA or State equivalents (206(b)(5))
- to a Federal, State, or local public health agency only with regard to information that is described in section 201(4)(A)(iii) and that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness, and that the employee whose family member or family members is or are the subject of a disclosure under this paragraph is notified of such disclosure. (206(b)(6))

EMPLOYEE REMEDIES AND EEOC ENFORCEMENT UNDER GINA

- EEOC Enforcement
 - Charge of discrimination
 - Hostile work environment claims
 - Retaliation
- Remedies/Damages
 - Back pay
 - Compensatory damages (capped based on number of employees)
 - Emotional distress and pain and suffering
 - Costs and attorney fees

INNOVATION

- Innovating business purpose
- Pivoting and using existing resources
- Connecting with workers
- Community connections
- Infrastructure





QUESTIONS?

- Alerts
- Webinar Recordings
- National and State Resources
- <https://www.coronavirus.hollandhart.com/>



THANK YOU!



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