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Teleworking and Re-Opening and Vaccines, Oh My!

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Agenda

I. Legal Framework

I. Teleworking

II. Re-Opening

III. Vaccines

Legal Framework

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

Generally

Prohibits employment discrimination against individuals with disabilities in the workplace by prohibiting employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "**direct threat**."

Even if an individual's disability poses a direct threat, an employer cannot exclude an individual from the workplace or take any other adverse action **unless there is no way to provide a reasonable accommodation, absent undue hardship**. Employers are also required to provide reasonable accommodations for individuals with disabilities when they request one, absent undue hardship.

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

"Direct Threat"

The individual's disability poses a "significant risk of substantial harm" to the employee's own health

Factors:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that potential harm will occur; and

(4) the imminence of the potential harm.

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

"Reasonable Accommodation"

The employee must be able to perform the **essential functions of their job**, with or without accommodation so long as the accommodation does not impose an undue hardship on the employer

- An interactive process. Employers may ask questions to determine whether the condition is a disability; discuss with the employee how lore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

"Undue Hardship" means causing significant difficulty or expense for the employer.

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

Disability-Related Inquiries

The ADA also places limits on an employer's ability to make disability-related inquiries or require medical examinations based on three stages: pre-offer, post-offer, and employment.

- **Pre-offer**: the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job.
- **Post-Offer** (often the employer provided a conditional job offer, but before they start work): an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- **Employment: an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.**

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

"Job-related and consistent with business necessity"

Employer has a reasonable belief, based on objective evidence, that:

- an employee's ability to perform essential job functions will be impaired by a medical condition; or
- an employee will pose a direct threat due to a medical condition.

ADA (Americans with Disabilities Act) and the Rehabilitation Act as amended in 2008

Confidentiality Requirements

Medical information obtained from a disability-related inquiry or medical examination must be kept confidential and stored separately from regular personnel files.

- This includes medical information from voluntary health or wellness programs.
- Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

Age Discrimination in Employment Act (ADEA)

Prohibits employment discrimination against individuals 40 and older.

Title VII of the Civil Rights Act

Prohibits employment discrimination on the basis of:

- Race
- Color
- Religion
- Sex (including pregnancy, sexual orientation, or gender identity)
- National origin

Genetic Information Nondiscrimination Act (GINA)

Prohibits employers from asking employees medical questions about family members.

Occupational Safety and Health Administration (OSHA)

General Duty Clause: Employers have a general duty to provide a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm."

OSHA Recordability: COVID-19 may be recordable.

Teleworking

ADA and Reasonable Accommodations

- Employers are prohibited from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat.
- The EEOC has determined COVID-19 poses a direct threat to both the individuals with the disease and those with whom they come into contact.
- Even if an individual's disability poses a direct threat, an employer cannot take any other adverse action unless there is no way to provide a reasonable accommodation, absent undue hardship.
- Employers are also required to provide reasonable accommodations for individuals with disabilities when an accommodation exists, absent undue hardship.

ADA and Reasonable Accommodations

The EEOC website which provides a number of helpful examples and scenarios. Here are a couple demonstrative scenarios:

Is an employer required to provide teleworking options? No.

May an employer provide requested accommodations on interim or trial bases? Yes.

If teleworking is not an option, what other options are there?

- Protective gear
- Enhanced protections at the workplace (barriers)
- Unpaid leave
- Modification of work schedules

ADA and Reasonable Accommodations

An employer knows that an employee has a condition which places them in a "higher risk" category and is concerned that their health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation.

1. Is the employer required to take action? No.
2. May the employer exclude the employee from work? Generally, no.

ADA and Reasonable Accommodations

An employer knows that an employee has a condition which places them in a "higher risk" category and is concerned that their health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation.

The ADA prohibits exclusion unless the individual poses a direct threat. Though an employer is concerned about their health upon returning to work, having a disability placing the individual at "higher risk" is not sufficient to pose a direct threat. In evaluating the factors to determine whether the direct threat standard is met, the employer would look at the individual's disability, the prevalence/severity of the pandemic in the particular area, countermeasures in place/limits on exposure, the individual's job duties.

Additionally, employers should avoid running afoul of the ADA based on a "perceived disability" where the employee has not requested the accommodation.

ADA and Reasonable Accommodations

Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition?

No. Protections under ADA are limited only to the employee with the disability.

ADA and Disability-Related Inquiries

May an employer ask for documentation of a covered disability when an individual requests a reasonable accommodation?

Yes. If the disability or need for the accommodation is not known, then it is job-related and consistent w/ business necessity for an employer to ask an individual for reasonable documentation about the disability and the limitations that require reasonable accommodation.

Confidentiality will also apply to this scenario.

ADA and Confidentiality

Best practices when teleworking:

1. Must safeguard information to greatest extent possible
2. Use initials, code to ensure confidentiality of identity of individual
3. Do not leave information out for others to access it

Re-Opening

ADA and Reasonable Accommodations

We again start with the general rule:

- Employers are prohibited from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a direct threat.
- The EEOC has determined COVID-19 poses a direct threat to both the individuals with the disease and those with whom they come into contact.
- Even if an individual's disability poses a direct threat, an employer cannot take any other adverse action unless there is no way to provide a reasonable accommodation, absent undue hardship.
- Employers are also required to provide reasonable accommodations for individuals with disabilities when an accommodation exists, absent undue hardship.

ADA and Reasonable Accommodations

An employer may exclude those with COVID-19 or with symptoms associated with COVID-19 from the workplace because their presence would pose a direct threat.

However, this does not apply for those teleworking or not physically interacting with coworkers or others (such as customers). These individuals would not pose a direct threat.

ADA and Reasonable Accommodations

An employee may make new, continued, or renewed requests for reasonable accommodations which require employers to engage in the same interactive process.

- An employer may restore all essential duties when it chooses to restore the prior work arrangement and then evaluate any requests for continued or new accommodations

Best Practices:

- To address the issue of potential delay, an employer may invite employees to ask for reasonable accommodations they may need in the future.

ADA and Reasonable Accommodations

Is an employer required to continue allowing employees to telework if an employee requests to? No.

If an employer is permitting employees to telework which excuses them performing one or more of their essential functions, must an employer continue permitting the employees to telework and eliminate the essential function from their job as an accommodation? No.

If an employer is choosing to excuse an employee from performing one or more essential functions as an accommodation, then a request does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA does not require an employer to eliminate an essential function as an accommodation.

ADA and Disability-Related Inquiries and Medical Examinations

During employment, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.

Consistency is key. Must not engage in unlawful disparate treatment based on protected characteristics.

ADA and Disability-Related Inquiries and Medical Examinations

May an employer ask individuals physically entering the workplace if they have been diagnosed or tested for COVID-19? Yes.

May employers ask about symptoms associated with COVID-19? Yes.

Take temperatures? Yes.

What about those who are teleworking, may employers ask them? No. They are not physically interacting with coworkers.

ADA and Disability-Related Inquiries and Medical Examinations

What if an employee is coughing, may an employer only ask them screening questions or ask them to have their temperature taken?

As of 3/27/2020, yes. This was permissible because a cough is one of the symptoms associated with COVID-19. However, an employer must have a reasonable belief based on objective evidence the individually may have COVID-19.

Recall that an employer may make a disability-related inquiry if it is job-related and consistent with business necessity. This standard can be met where an employee has a reasonable belief, based on objective evidence, that an employee will pose a direct threat to the health or safety of her or himself or others.

ADA and Disability-Related Inquiries and Medical Examinations

May an employer exclude an employee who refuses from the workplace? As of 3/27/2020, an employer could exclude an employee from physical presence in the workplace. However, an employer may want to ask the reasons for such refusal and provide information or reassurance they are taking the steps to ensure everyone's safety.

ADA and Disability-Related Inquiries and Medical Examinations

Permissible inquiries:

- Asking about absences.
- Asking about travel. (Not disability related inquiry).
- Asking if an individual is returning from a certain place (if CDC or state or local public health officials recommend quarantining afterwards).

ADA and Disability-Related Inquiries and Medical Examinations

- **Reasonable Accommodations:** An employer must still consider other screening measures in the event an individual requests a reasonable accommodation.
- **Confidentiality:** All medical information must be kept confidential, even if it is not about a disability. COVID-19 symptoms or diagnosis are medical information.
- **GINA:** An employer cannot ask employees medical questions about family members.
  - *A better inquiry would be to ask if an individual has had any contact with anyone diagnosed with or having symptoms associated with COVID-19*

ADA and Confidentiality

- **May a coworker report symptoms of another to their supervisor?** Yes.
- **May an employer tell others another employee is on leave or teleworking?** No.
- **May they disclose the reason for the leave (if COVID or associated symptoms)?** No.

OSHA Recording

Employers are responsible for recording cases of COVID-19 if:

- Case is a confirmed case of COVID-19 as defined by the CDC
- Case is **work-related** as defined by 29 CFR § 1904.5
- Case involves one or more of the general recording criteria set forth in CFR § 1904.7

OSHA Recording

Should be coded as respiratory illness on OSHA Form 300

If an employee voluntarily requests their name not be entered on the log, employer must comply as specified under 29 CFR § 1904.29(b)(7)(vi).

Exceptions: employers with 10 or fewer employees and certain employer in low-hazard industries need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye

OSHA Recording

"**Work-related**" as defined by 29 CFR § 1904.5

OSHA's Compliance Safety and Health Officers consider:

- The reasonableness of the employer's investigation into work-relatedness

  (1) to ask the employee how he believes he contracted the COVID-19 illness;

  (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and

  (3) review the employee's work environment for potential exposure — including any other instances of workers in that environment contracting COVID-19 illness.

- The evidence available to the employer
- The evidence COVID-19 illness was contracted at work

  Ex. several cases that develop among workers who work closely together; after lengthy, close exposure to a particular individual with confirmed case of COVID-19, job duties involve frequent, close exposure to general public in locality w/ ongoing community transmission, and there is no alternative explanation to any of the above

Other OSHA Considerations

- Personal Protective Equipment when required (and reasonable accommodations)
- Other standards for employers to protect employees from exposure to hazardous materials, including those from chemicals from cleaning and disinfection and diseases

Other Title VII Considerations

- Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals 40 and older—an employer cannot exclude an individual 65 or older (even if they are trying to protect them). Employers are free to provide flexibility to those individuals.
- Religious accommodations in the event there is a need for modified protective gear due to religious garb
- Other EEO-protected characteristics (such as sex)
- An employer cannot treat female individuals differently than male individuals because of a gender-based assumption about caretaking responsibilities (for instance, allowing a reasonable accommodation such as telework, modified schedule, or another benefit to females based on the gender-based assumption they have caretaking roles)
- An employer cannot exclude a pregnant woman from work.

Vaccinations

EEOC Guidance

Generally, an employer is permitted to require a COVID-19 vaccination.

- It may be a qualification standard

Reasonable Accommodations

If an employee cannot get vaccinated for COVID-19 because of disability or sincerely held religious belief, practice, or observance, an employer should engage in the interactive process to identify reasonable accommodations (such as remote work, work with less person-to-person interaction, or work with PPE) and /or determine if the employee poses a direct threat.

If there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.

ADA and Disability-Related Inquiries and Medical Examinations

The EEOC has issued guidance as of December 2020 indicating the COVID-19 vaccine itself is not a "medical examination" for purposes of the ADA. By administering a vaccine, an employer is not seeking information about an individual's impairments or current health status, and is therefore not a medical examination.

ADA and Disability-Related Inquiries and Medical Examinations

Pre-Screening questions may implicate the ADA's rules concerning disability-related inquiries.

- An employer must show the disability-related screening inquiries are "job-related and consistent with business necessity."
- Must maintain confidentiality.

ADA and Disability-Related Inquiries and Medical Examinations

Does this standard apply where an employer administers or contracts with a third party to administer a vaccine? Yes.

The screening questions are still subject to the ADA rules for disability-related inquiries, as they are likely to elicit information about a disability.

What if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider? No.

The screening questions would not be subject to the ADA rules for disability-related inquiries.

ADA and Disability-Related Inquiries and Medical Examinations

Would asking for proof of a vaccination be considered a disability-related inquiry?

Without anything else, no. However, additional questions, for instance, asking "why" they did not receive a vaccination, could elicit information about a disability and thus implicate the ADA's rules concerning disability-related inquiries.

Best practices: An employer can warn the individual on the front end not to provide any medical information as part of the proof of a vaccination in order to avoid implicating the ADA.

ADA and Disability-Related Inquiries and Medical Examinations

What if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated)?

The ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

Optional Vaccines and Incentives/Rewards

An employer is permitted to offer incentives/rewards.

Important considerations:

- Potential discrimination cases. An employee who cannot be vaccinated due to a medical disability or religious belief may allege they are a victim of discrimination because they were not eligible for the incentive due to their protected class/ trait. An employer might have to consider an alternate way to make the same incentive available to them.
- Potential legislation to limit certain wellness related incentives. While legislation was previously proposed, it was recently withdrawn which leaves employers with very little guidance as to what incentives they may be able to offer and what accommodations are appropriate for those employees who cannot receive the vaccine to avoid violating the ADA or Title VII of the Civil Rights Act.

Optional Vaccines and Incentives/Rewards

Ideas for Incentives:

- Paid time to undergo the vaccine for those who do so during work hours.
- Paid time off for those who experience side effects (like fatigue) the day after the vaccine.

These can ensure employees who get the vaccine are not losing time while away from work and employees who cannot get the vaccine are not losing time from work, thus not missing out on an incentive.

OSHA Guidance

OSHA:

In a 2009 letter about the influenza vaccine, OSHA also advised employers may require an employee to take an influenza vaccine as long as they do not interfere with the employee's right to refuse vaccination because of a "reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as [a] serious reaction to the vaccine)."

FFCRA Guidance

- Families First Coronavirus Response Act (FFCRA) expired Dec. 31, 2020
- Tax credits still in place for employees who voluntarily offer paid leave
- President Biden has asked Congress to expand the FFCRA and expand it through Sept. 30, 2021

FFCRA Guidance

FAQ: Can employers deny paid leave to employees who refuse the vaccine?

TBD. Not as the law was previously written.

Other Considerations

- Union Employees
- General Liability
  - State legislation
- Workers' Compensation

General Liability FAQs

- If an employee contracts COVID-19 in a workplace where the vaccine was not mandated and spreads the virus to a family member, can the family member sue the employer?
- Can third parties in the community sue the employer?

Workers' Compensation Systems

- **State workers' compensation system**
- **Fact-specific**
- **Evolving law**

There are two federal programs set up to compensate an individual who has a severe reaction to a vaccination:

1. **Vaccine Injury Compensation Program (VICP)**

   VICP covers only certain types of vaccines for diseases such as the flu, HPV, hepatitis A & B, measles, mumps, tetanus, rubella, and more

2. **Countermeasures Injury Compensation Program (CICP)**

   CICP covers countermeasures for diseases such as Ebola, Zika, Pandemic Influenza, Anthrax, Smallpox, and more

VICP and CICP

- Right now, anyone with a COVID-19 vaccine injury must go through the CICP
- But there is a push to have the federal government to open up the long-established VICP to COVID-19 injury claims
- The CICP is a “payer of last resort” — it will reimburse or pay for medical services or items or lost employment income not covered by other third-party payers like workers’ compensation

Can an Employer Face Workers' Compensation Liability Surrounding the Vaccine Administration?

Answer: It depends (on the facts)!

- In Georgia:

- An Employer-mandated COVID-19 vaccine → Most likely yes
  - "Arising out of"
  - "In the course of"
- A non-employer-mandated COVID-19 vaccine →Factors to consider:
  - Employer pays or provides for it
  - Employer offers it on location
  - Employer allows an employee to receive it during their shift
  - Employer implies it is required or urges an employee to receive it

Is This Compensable?

Using Georgia as a case study, an employee must show an injury…

1. "Arising out of" =causal connection between the condition of the work and resulting injury

An adverse reaction or injury could be causally related if the COVID-19 vaccine was mandated, as it would likely constitute a condition of the work

This element would likely be met regardless of where the COVID-19 vaccine took place or who was administering it because it is mandated for working

Is This Compensable?

2. “In the course of”– time, place, and circumstances under which accident occurred

(1) within the period of employment

(2) at a place where the employee reasonably may be in the performance of the employee's duties, and

(3) while the employee is fulfilling the employee's duties or is engaged in something incidental thereto.

--This is a more difficult question because it could take place off the employer’s premises or outside of work hours; however, there could still be potential liability for adverse reactions if the employer mandates the vaccine because though not at the employer’s location or during work hours, it could be considered required as part of an employer’s duties

Example

- **2012-031477 Trial Decision**: An employer required a hospital employee to receive immunization shots and shortly after the shot, she developed pain in her right arm. She underwent an MRI that revealed a labral tear. One physician related her right shoulder condition to the shot she received and issued a 5% PPD rating. Another physician indicated the right shoulder condition was not related and issued a 0% PPD rating.
- The main issue was whether the employee was entitled to PPD benefits. However, the employer/insurer had also been previously ordered to pay the employee's medical expenses.
- The ALJ found the employer/insurer were responsible to provide and pay for the claimant's medical expenses. However, the ALJ believed a 0% impairment rating was appropriate and the employee was not entitled to PPD benefits.

Final Thoughts

- Risks and benefits of requiring or encouraging the COVID-19 vaccine
- Risks and benefits of COVID-19 exposure

QUESTIONS?

THANK YOU!

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STATEMENT OF THE CASE

On December 17, 2013, counsel for the employee filed a Form WC-14 requesting a hearing. Counsel for the employee requests: (1) payment medical expenses awarded under an award, dated November 13, 2013, by Judge Tifverman; (2) PPD benefits; (3) litigation expenses and assessed attorney fees, and (4) the imposition of civil penalties.

Counsel for the employer/insurer, commendably, agrees that the medical expenses, including applicable late-payment penalties, awarded under the prior award are the responsibility of the employer/insurer. However, counsel for the employer/insurer asserts that the employee is not entitled to PPD benefits as requested because Dr. Scott Quisling gave a 0% PPD rating. Finally, counsel for the employer/insurer asserts assessed attorney fees and civil penalties are not due.

A hearing was held on February 5, 2014 in Atlanta, Georgia. At the hearing, the parties stipulated to jurisdiction, the employer being subject to the Act, venue—Fulton County, coverage, accident, injuries, average weekly wage of $290.00, yielding a workers' compensation rate of $193.33, and notice.

The record consists of C-1 and Exhibits A-C. The record closed at the hearing.

The transcript was filed with the Board on February 18, 2014.

By March 5, 2014, both attorneys filed a well-written brief in support of their respective positions.

After a review of the record as a whole, including consideration of the testimony of the witnesses, along with the arguments presented by the attorneys, I find the employer/insurer is liable for the employee's outstanding medical expenses, including a 20% late-payment penalty. Further, because I find the employer/insurer has been unreasonable in not timely paying the employee's outstanding medical expenses, I find assessed attorney fees are due. Finally, I find the employee is not entitled to PPD benefits, as requested, and I decline to award litigation expenses or impose a civil penalty.

After a review of the record as a whole, including consideration of the credibility of the witnesses and the documents admitted into evidence, I find the preponderance of competent and credible evidence reveals as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In July of 2012, the employee was hired by the employer. (T. 11-12, 24-25). Because the employee was going to work in a hospital setting, the employee was required to receive immunization shots.

2. On July 6, 2012, the employee received a shot in her right arm. (T. 11-16). The employee testified that shortly after the shot she developed right arm pain.

3. After this incident, the employee sought and received medical treatment at Grady and with Dr. Herbert H. Gunn, Jr. (C-1). The employee testified that she received, from January 2013 through July of 2013, physical therapy through heat pack/ice pack treatment for her arm pain. (T. 17-18, 31).

4. The employee testified that she did not miss anytime from work due to this injury. (T. 18-19, 24-25). It appears the employee only worked for a couple of weeks/months with the employer. Id.

5. Dr. Gunn diagnosed the employee with a slap tear, partial distal supraspinatus tendon tear, nerve injury to the arm and shoulder, tenosynovitis, tendinitis, inferior spinatus tendon tear, shoulder joint effusion, and radicular arm pain. (T. 31). Dr. Gunn indicated that the employee's right arm/shoulder condition was related to her shot received on July 6 2012. (T. 34).

6. On February 2, 2013, the employee underwent a right shoulder MRI. This MRI revealed labral tear.

7. On September 26, 2013, a hearing was held before The Honorable Nicole Tifverman.

8. In an award, dated November 13, 2013, Judge Tifverman directed the employer/insurer to pay the employee's outstanding medical bills, and awarded $5,000.00 in assessed attorney fees for the employer/insurer's unreasonable delay in paying the employee's outstanding medical expenses.

9. On November 20, 2013, the employee was evaluated by Dr. Scott G. Quisling. (D-1). Dr. Quisling diagnosed the employee with a right shoulder rotator cuff tear, slap tear, and possible adhesive capsulitis. Dr. Quisling indicated that the employee's right shoulder condition was not work-related and gave the employee a zero percent PPD rating.

10. On December 12, 2013, the Appellate Division dismissed the employer/insurer's appeal of Judge Tifverman's award as untimely.

11. On January 6, 2014, Dr. Gunn opined that the employee had a 5% whole body PPD rating. (C-1, pp. 20-24). Dr. Gunn indicated that the employee's right shoulder condition was related to her 7/6/12 shot.

12. Dr. Gunn testified at the hearing that his medical bills have not been paid. (T. 27-30). Dr. Gunn testified that in his opinion the employee had a 5% whole body rating or a 9% upper extremity rating. (T. 30).

13. The employee requests her outstanding medical bills be paid by the employer/insurer.

14. Generally, in a compensable claim, I find the employer/insurer is responsible to provide and pay for only reasonable and necessary medical treatment for the employee's work-related injuries that grants relief, effects a cure, or restores the employee to suitable employment. *See generally* O.C.G.A. § 34-9-200(a); Board Rule 200. In addition, the employee's authorized treating physician may refer the

employee for other specialized medical services and treatment, including physicians, as required by the nature of the employee's injury, without prior authorization of the Board. *See* O.C.G.A. §34-9-201(b)(1).

15. In this claim, I find the employer/insurer is liable for the following medical expenses:

(1) Metropolitan Medical Center – Dr. Herbert H. Gunn - $7,455.00
(2) Dunwoody Imaging – MRI - $1,700.00
(3) Grady Health Systems - $167.00
Total: $9,322.00

16. Since the employee's medical bills have not been timely paid, I find the employer/insurer is liable for a 20% late-payment penalty.

17. The employee requests PPD benefits based upon a 5% whole body rating or a 9% upper extremity rating.

18. An employee is entitled to permanent partial disability income benefits when an employee suffers a permanent disability that is "partial in character but permanent is quality." *See* O.C.G.A. §34-9-263(a). When an employee suffers a partial but permanent loss as a result of a work-related injury, an employer shall pay permanent partial disability income benefits to the employee according to the schedule (and AMA Guidelines, 5th ed.) included with O.C.G.A. §34-9-263. PPD benefits are due if the employee is not receiving either TTD or TPD benefits. O.C.G.A. §34-9-263(b)(2)*;* Printpack, Inc. v. Crocker, 260 Ga. App. 67, 579 S.E.2d 225 (2003)(PPD benefits are due when an employee suffers a permanent scheduled disability under O.C.G.A. §34-9-263(c)). When the employee is no longer entitled to TTD or TPD benefits, within 30 days of such cessation, the employer is required to have the employee rated for PPD. *See* Board Rule 263. When a PPD rating is given, the employer is required to commence PPD benefits within 21 days of the rating. *See* Board Rule 263.

19. In workers' compensation claims, although all medical opinions must be considered, acceptance of an opinion is not required. *See* Liberty Mutual Ins. Co. v. Nobles, 147 Ga. App. 81 (1978). Further, the weight and credit to be given to expert testimony is a question exclusively for decision by the fact-finder, making the opinions of expert witnesses advisory and binding the fact-finder only to the extent to which credence is given to the opinion. *See* Department of Revenue v. Graham, 102 Ga. App. 756, 759; 117 S.E.2d 902 (1960)(internal citations omitted). Thus, the Board may accept the testimony of one expert over the testimony of another. Further, the rejection of an expert medical opinion is within the authority of the Board, as the Board is not absolutely bound to accept such expert opinions, even when uncontroverted. *See* Fulton County Board of Education v. Taylor, 262 Ga. App. 512, 514-515, 586 S.E.2d 51 (2003). Therefore, the Board is free to accept the testimony of one doctor over that of another or reject an expert medical opinion outright.

20. After carefully considering the record as a whole, I find there is a range of evidence concerning the employee's PPD rating. *See* Mix v. Allied Readymix, 248 Ga. App. 261, 546 S.E.2d 41 (2001)(In determining a PPD rating, an ALJ may determine the employee's PPD rating based upon the range of evidence in the record). After considering the evidence in the record, at this time, I find the employee is not entitled to PPD benefits. I find Dr. Quisling's assessment, analysis, and opinion to be very persuasive. As such, because Dr. Quisling credibly opines that the employee does not have an impairment rating due to her 7/6/12 incident, I find the employee is not entitled to PPD benefits.

21. Counsel for the employee requests assessed attorney fees due to the employer/insurer's unreasonable delay in paying the employee's medical bills. (T. 58-66).

22. Assessed attorney fees may be awarded upon the determination that a proceeding has been prosecuted or defended in whole or in part without reasonable grounds. *See* O.C.G.A. § 34-9-108(b)(1). Whether unreasonable grounds exist for the imposition of assessed attorney fees is a question of fact to be determined by the Board. *See* Printpack, Inc. v. Crocker, 260 Ga. App. 67, 579 S.E.2d 225 (2003); Mt. Vernon Mills, Inc. v. Gunn, 197 Ga. App. 109, 397 S.E.2d 603 (1990).

23. After a review of the record as a whole, I find the employer/insurer has been unreasonable in not timely paying the employee's outstanding medical expenses. As such, I find assessed attorney fees are due. I find the fair and reasonable value to be assessed is $2,200.00. Finally, I decline to award litigation expenses or impose a civil penalty.

AWARD

1. Based upon the foregoing findings of fact and conclusions of law, the employer/insurer is directed to pay the following medical expenses:

(1) Metropolitan Medical Center – Dr. Herbert H. Gunn	- $7,455.00
(2) Dunwoody Imaging – MRI	- $1,700.00
(3) Grady Health Systems	- $167.00
	Total: **$9,322.00**

2. The employer/insurer is directed to pay a 20% late-payment penalty on the above listed medical expenses.

3. The employee's request for PPD benefits is denied.

4. The employee's request for the imposition of civil penalties and award of litigation expenses is denied.

5. The employer/insurer is directed to pay counsel for the employee $2,200.00 in assessed attorney fees.

IT IS SO ORDERED, this the 12th day of March, 2014.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
/s/ David K. Imahara
ADMINISTRATIVE LAW JUDGE

NRRDA Article

MANDATING COVID-19 VACCINES—BALANCING THE RISKS AND BENEFITS

As government stay-at-home orders continue to be modified and COVID-19 vaccines become available, employers who are in the re-opening process are asking: 1) Can I require all my employees to receive the COVID-19 vaccine? and 2) Should I require all employees to receive the COVID-19 vaccine? For employers leaning in the direction of requiring vaccinations for their employees, they be well advised to consider the EEOC's guidance on topic taking into account the requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act, and the regulations issued by the Occupational Safety and Health Administration (OSHA). The guidance, statutes, and regulations would suggest the answer to the query to be--"yes, employers may mandate that employees receive COVID-19 vaccines, but …." This article will unpack the caveat.

COVID-19 vaccines can be required as long as employers make appropriate exceptions for individuals who have a health condition which prohibits them from receiving the vaccine. If an employee provides the appropriate documentation from a medical provider indicating (s)he should not receive the COVID-19 vaccine, the employer should proceed with the interactive process required by the ADA to find a reasonable accommodation which allows the employee to continue performing the essential functions of their job, without the COVID-19 vaccine. Reasonable accommodations may include less face-to-face interaction with other individuals, use of PPE, or teleworking, if feasible for the position.

A second exception to exempt an individual from a mandatory COVID-19 vaccine is the religious exception, which is recognized by Title VII, and includes individuals with sincerely held religious beliefs which prohibit receipt of the COVID-19 vaccination. Title VII instructs employers to offer reasonable

accommodations in such a case, and employers must do so with relatively little interrogation as to whether an employee's belief system is a religious belief. While an employer may make a reasonable inquiry in to the sincerity of an employee's belief or practice (including a request for supporting information from those who are aware of the employee's religious beliefs or practices), Courts consistently give great deference to an individual's religious beliefs and an employer should ordinarily assume that an employee's request for religious accommodation is indeed based upon sincerely held religious beliefs.

The third exception to requiring mandatory COVID-19 vaccines are for union employees who have entered into a collective bargaining agreement that prohibits such mandatory vaccines. If you have union employees, double check whether the collective bargaining agreement addresses this before requiring the vaccine.

Barring these three exceptions, an employer can mandate COVID-19 vaccines. However, the more prudent question may be whether just because an employer can, should it? The answer to that question may be less clear, but here are some issues to consider.

The obvious advantages of mandating the vaccine are limiting the spread of COVID-19 in the employer's workforce and limiting the spread in the community and/or to customers/clients. Further, as employers have a legal obligation to provide a safe workplace for employees, OSHA's General Duty clause comes into play as the specific statute which requires employers to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. Interestingly, OSHA has stated that, under its General Duty clause, employers should not interfere with an employee's right to refuse vaccination based on a reasonable belief that their medical condition might create a real danger of serious illness or death (such as an adverse reaction to the vaccine).

Employers may require medical documentation in support of any exemption request based upon a medical condition.

Employers concerned about limiting the spread of COVID-19 among their customers and community are correct to weigh such considerations. Certainly, everyone—including employers—must do their part to slow the spread of this disease. Practically speaking, contact tracing that may be utilized to contain the spread of COVID-19 requires valuable time and resources at a time when most employers are trying to sustain their business model with fewer employees. While there is currently no federal legislation to protect a business from liability claims caused by the spread of COVID-19, many states (Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah and Wyoming) have enacted legislation providing businesses immunity from legal liability for claims related to COVID-19 exposure. However, the extent to which those statutes hold up to legal challenges is to be seen. As an example, if a statute provides that a customer assumes liability be entering a business' premises, would the same assumption of risk apply to a family member who then contracts COVID-19 from the customer who entered the business' premises?

Mandatory COVID-19 vaccines also pose a morale issue to an employer's workforce. Even for those individuals who do not have an identifiable exception they can rely on to avoid taking the vaccine, there may be hesitation to take the vaccine for other issues of trust of government authorities and science. Employers will have to weigh the potential impact of mandating vaccines on the morale of their workforce and whether such a mandate would encourage most of their employees to return to the work site or cause them to seek alternative employers who may accommodate their concerns and fears.

Then there is the issue of workers' compensation liability. Would mandatory COVID-19 vaccines curtail workers' compensation liability? That depends on state laws regarding the compensability of COVID-19 injury or death cases. Some states have enacted legislation making COVID-19 a compensable

work injury; thus, vaccines may be more helpful to employers in those states to curtail their liability. Regardless of whether being infected with COVID-19 is considered a compensable work injury in your state, employers should also consider whether injuries arising from the vaccine administration itself might be compensable. For instance, in a Georgia case an employee was found to have sustained a compensable work injury (specifically a tendon tear) to her shoulder as the result of a mandatory flu vaccine. Adverse reactions to the vaccine itself must also go through states' workers' compensation systems, if the vaccine was administered as part of a mandatory vaccine program by the employer. If there is no workers' compensation coverage, the Federal Countermeasure Injury Compensation Program (CICP) may reimburse the costs of medical and lost income only as a payer of last resort. There has been a push to have the federal government open up the long-established Vaccine Injury Compensation Program (VICP) to COVID-19 vaccinations, for handling similar to flu vaccinations. However, for now, anyone with a COVID-19 vaccine injury or reaction must go through the CICP.

The administration of a mandatory COVID-19 vaccine raises many other considerations under the ADA, which cannot be fully unpacked in this article. Employers who require the vaccine must consider whether the vaccine will be administered by the employer (for instance by an in-house nurse) or by a third party. If the employer administers the vaccine, the employer must be sure that any pre-vaccine screening questions comply with ADA's guidelines regarding what information an employer may solicit from employees. The ADA requires employers' medical inquiries be job-related and consistent with business necessity.

In lieu of requiring COVID-19 vaccines, some employers may choose to provide incentives for employees who receive the vaccine from a third-party provider. In order to avoid allegations of discrimination against employees with a medical or religious exemption, employers might consider alternative ways for all employees to receive the same incentive. Incentives like paid time off for

employees who get the vaccine during work hours and/or paid time off for employees who experience side effects (like fatigue) in the days after the vaccine might be low risk incentives. Employees who do not receive the vaccine are not losing time from work and therefore would not be missing out on the incentive. However, paid sick leave for COVID-19 symptoms should not be conditioned upon receipt of the vaccine. Legislation proposed by the EEOC regarding wellness related incentives may be forthcoming and may provide additional guidance in the coming months.

As with most legal issues, there is no "one size fits all" solution to the issue of mandatory COVID-19 vaccines and the pitfalls taking such a position may pose. Therefore, it would be prudent for each employer to consult with legal counsel regarding its proposed COVID-19 vaccine policies, as the law continues to evolve at the local, state and federal level, to understand the risks and benefits posed by their position on the issue.

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Revised Short Term Guidance on OSHA Recordability of COVID-19

Effective May 26, 2020, the Occupational Health and Safety Administration (OSHA) rescinded its previous memorandum with respect to the recording of occupational illnesses, specifically cases of COVID-19. Previous guidance required employers of workers in the health care industry, emergency response organizations (e.g., emergency medical, firefighting and law enforcement services) and correctional institutions continue to make work-relatedness determinations pursuant to 29 CFR § 1904, while suspending these work-relatedness determinations for other employers, except where there is objective evidence reasonably available to the employer that a COVID-19 case may be work-related.

This new memorandum outlined below remains in effect until further notice, with the intent for this guidance to be time-limited to the current COVID-19 public health crisis.

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and thus all employers are responsible for recording cases of COVID-19, if:

1. The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
2. The case is work-related as defined by 29 CFR § 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 CFR § 1904.7.

Note: employers with 10 or fewer employees and certain employers in low-hazard industries have no recording obligations. They need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation or loss of an eye.

Because of the difficulty with determining work-relatedness, OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations. In determining whether an employer has complied with this obligation and made a reasonable determination of work-relatedness, OSHA's Compliance Safety and Health Officers (CSHOs) will consider:

The reasonableness of the employer's investigation into work-relatedness

Employers, especially small employers, are not expected to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. It is sufficient in most circumstances for the employer, when it learns of an employee's COVID-19 illness, (1) to ask the employee how he believes he contracted the COVID-19 illness; (2) while respecting employee privacy, discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and (3) review the employee's work environment for potential exposure — including any other instances of workers in that environment contracting COVID-19 illness.

The evidence available to the employer

The evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee's COVID-19 illness, then that information should be taken into account as well in determining whether an employer made a reasonable work-relatedness determination.

The evidence that a COVID-19 illness was contracted at work

Evidence suggesting COVID-19 illnesses are likely work-related includes:

- Several cases that develop among workers who work closely together and there is no alternative explanation.
- Onset shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation.
- Job duties involve frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

An employee's COVID-19 illness is likely not work-related if:

- She is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- Outside of the workplace, she closely and frequently associates with a family member, significant other or close friend who (1) has COVID-19; (2) is not a co-worker; and (3) exposes the employee during the period in which the individual is likely infectious.

If, after the reasonable and good faith inquiry described above, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.

COVID-19 is a respiratory illness and should be coded as such on the OSHA Form 300. Because this is an illness, if an employee voluntarily requests that his or her name not be entered on the log, the employer must comply as specified under 29 CFR § 1904.29(b)(7)(vi).

If you wish to further discuss these updates or have any questions, please contact Swift Currie attorneys:

Crystal McElrath: 404.888.6116 or crystal.mcelrath@swiftcurrie.com
Anandhi Rajan: 404.888.6159 or anandhi.rajan@swiftcurrie.com

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Revised Guidance on What Employers Should Know About COVID-19 and the ADA and Rehabilitation Act

On April 23, 2020, the Equal Employment Opportunity Commission (EEOC) provided revised guidance regarding employers' obligations with respect to anti-discrimination laws, amid the challenges posed at the workplace and to the workforce by the COVID-19 pandemic. While this guidance may not provide answers for every situation, it highlights issues employers will have to consider before making decisions that affect their employees.

Disability-Related Inquiries and Medical Exams

- During a pandemic, employers subject to the Americans with Disabilities Act (ADA) may ask their employees if they are experiencing symptoms of the COVID-19 whenever employees call out sick. These symptoms now include fever, chills, cough, shortness of breath or sore throat.
- Employers may measure employees' body temperature, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions.
- When employees return to work, the ADA allows employers to require a doctor's note certifying fitness for duty.
- Employers may choose to administer COVID-19 diagnostic testing to employees before they enter the workplace to determine if they have the virus because an individual with the virus will pose a direct threat to the health of others.

Confidentiality of Medical Information

- An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease or the employer's notes or other documentation from questioning an employee about symptoms of COVID-19.
- An employer who requires employees to undergo a daily temperature check before entering the workplace may maintain a log of the results, but the log must remain confidential.
- An employer may disclose the name of an employee to a public health agency when it learns that the employee has COVID-19.
- A temporary staffing agency or a contractor that places an employee in an employer's workplace may notify the employer if it learns the employee has COVID-19 and, in doing so, disclose the name of the employee.

Hiring and Onboarding

- An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all entering employees in the same type of job.
- An employer may take an applicant's temperature as part of a post-offer, pre-employment medical exam (any medical exams are permitted after an employer has made a conditional offer of employment).
- An employer may delay the start date of an employee or withdraw a job offer when it needs the employee to start immediately, if the employee has COVID-19 or associated symptoms associated. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- An employer may not postpone the start date or withdraw a job offer because the individual is in a category that places them at higher risk of contracting COVID-19. However, an employer may choose to allow such an employee to telework or discuss with such employees if they would like to postpone their start date.

Reasonable Accommodation

- The ADA and the Rehabilitation Act apply to applicants and/or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC. These CDC designations, or any other designations of certain employees, do not eliminate coverage under the ADA or the Rehabilitation Act or other equal employment opportunity laws. Therefore, employers receiving requests for reasonable accommodation under the ADA or the Rehabilitation Act from employees in these categories of jobs must accept and process the requests as they would for any other employee. Whether the request is granted will depend on whether the employee is an individual with a disability and whether a reasonable accommodation can be provided without undue hardship to the employer.

Return to Work

- As government stay-at-home orders and other restrictions are modified or lifted in your area, employers may screen employees for COVID-19 when entering the workplace as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. Employers should make sure to not engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion.
- An employer may require employees to wear protective gear (e.g., masks and gloves) and observe infection control practices (e.g., regular hand washing and physical distancing protocols). However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading or gowns designed for individuals who use wheelchairs) or a religious accommodation under Title VII (such as modified equipment due to religious attire), the employer should discuss the request and provide the modification or an alternative, if feasible, if doing so would not create an undue hardship for the employer's business operations under the ADA or Title VII.

If you wish to further discuss these updates or have any questions, please contact Swift Currie attorneys:

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S/C

Manage Workers' Compensation Claims from Telecommuters

By Allen Smith, J.D.
October 12, 2020

Whether tripping over computer cords or their dogs, more remote workers are injuring themselves at home during the pandemic, leading to an increase in telecommuters' workers' compensation claims.

Some workers' claims are legitimate and compensable, while others aren't necessarily so. Determining the difference requires a familiarity with the law, which provides employers with some defenses. In addition, telework agreements can help defeat fraudulent claims, noted Carl "Trey" Dowdey III, an attorney with Swift, Currie, McGhee & Hiers in Birmingham, Ala.

"The blurring of the lines between injuries occurring in the course of and arising out of work versus injuries occurring during off-work status will be difficult to sort through," he said.

"Teleworkers may be doing work while also doing something nonwork-related—such as letting their dog out, talking on the phone to friends, playing with their kids or cooking—and discerning whether the injury was due to work or nonwork actions may be challenging," he said. "Some defenses will likely become more difficult to prove with unwitnessed teleworker injuries taking place away from an employer's normal place of business."

Some Claims Will Be More Familiar than Others

At-home workers' claimed accidents and injuries often will resemble those experienced in the employer's facilities, said Thomas Robinson, J.D., a Durham, N.C.-based co-author of *Larson's Workers' Compensation Law* (Matthew Bender, 2020).

"Office workers usually sustain trip-and-fall, lower-back strain, carpal tunnel syndrome injuries and the like," he said. "My feeling is that those same sorts of injuries will be sustained, on average, by at-home workers since their jobs, as such, haven't radically changed."

Added to those typical injuries may be miscellaneous claims, such as tripping-over-the-dog cases, which at least one court has ruled arose out of employment and may be compensable, and another decided wasn't (http://www.workcompwriter.com/home-based-workers-beware-of-four-legged-best-friends/).

With increased remote work during the pandemic, employers will have a more difficult time showing that falls resulted from household rather than employment risks, Robinson predicted. That's partly a result of more employers adjusting to the realities of child care and other personal issues, with some organizations allowing workers more freedom in when the work gets done, he said.

The workers' compensation requirement that injuries arise out of and in the course of employment to be compensable "works best where one's hours and location are set," Robinson stated. "One problem here is the fact that many courts will say to the employer, 'You had the option of allowing work at home and you chose that option. You may not now complain about the work conditions at the home. You should have taken a more active role in setting the safety of the work.' "

Defenses

In addition to arguing that injuries didn't arise out of and in the course of employment, employers have other defenses they can raise to workers' compensation claims, including teleworkers' claims. Dowdey said these defenses include:

- Notice defenses centering on whether the teleworker gives timely and appropriate notice to a supervisor of the injury.
- Misrepresentation defenses, which he said may become increasingly important when a teleworker with a pre-existing condition feels emboldened to game the system and claim a work injury. Ensure that proper warnings against such fraudulent misrepresentation are clearly set out in writing in any hiring documents, he recommended.

Occupation-related disease claims require a plaintiff to establish causation by showing that the disease is due to hazards that exceed those in ordinary employment and differ from those found in the general run of occupations, he said. Medical testimony is not required to prove these requirements, he added.

"Should claimants happen to telework in a residence or structure that has such hazards—for example, toxic mold—an employer could be exposed to an unexpected liability," he said. "Credibility would become key with any such claim," especially if it arises only after an employee starts to telework.

Because telecommuting injuries often are unwitnessed, the employee's prior work history, integrity, and diligence in following telework policies and timeliness as to reporting any claims will be important, he said.

Telework Agreement

Comprehensive telework agreements are essential to prevent or defeat fraudulent claims, Dowdey said.

He noted that an agreement should specify the teleworker's:

- Required job duties.
- Expected work product.
- Expected job location.
- Job hours and how the employee clocks in and out, as well as the repercussions for not doing so.
- Allowed break times.

These issues should be laid out in more detail, he said. "Such details would need to include when a teleworker may travel back to the employer's physical jobsite, as well as the procedure for providing notice and filing a workers' compensation claim," he said.

Employers may wish to set out in the telework agreement the right to inspect a residence after a claimed work injury, he said.

"If the telework agreement sets a specific time frame or time limit for the arrangement, the agreement should also make clear that it is not creating a guarantee or contract of employment for that time," said Crystal McElrath, an attorney with Swift, Currie, McGhee & Hiers in Atlanta. "The telework agreement may be terminated at any point, as may the overall employment."

[Need help with legal questions? Check out the new SHRM LegalNetwork (www.shrm.org/ResourcesAndTools/business-solutions/Pages/LegalNetwork.aspx?utm_source=shrm_article&utm_medium=shrm.org&utm_campaign=growth~legalnetwork~pressrelease)*.]*

Additional Steps

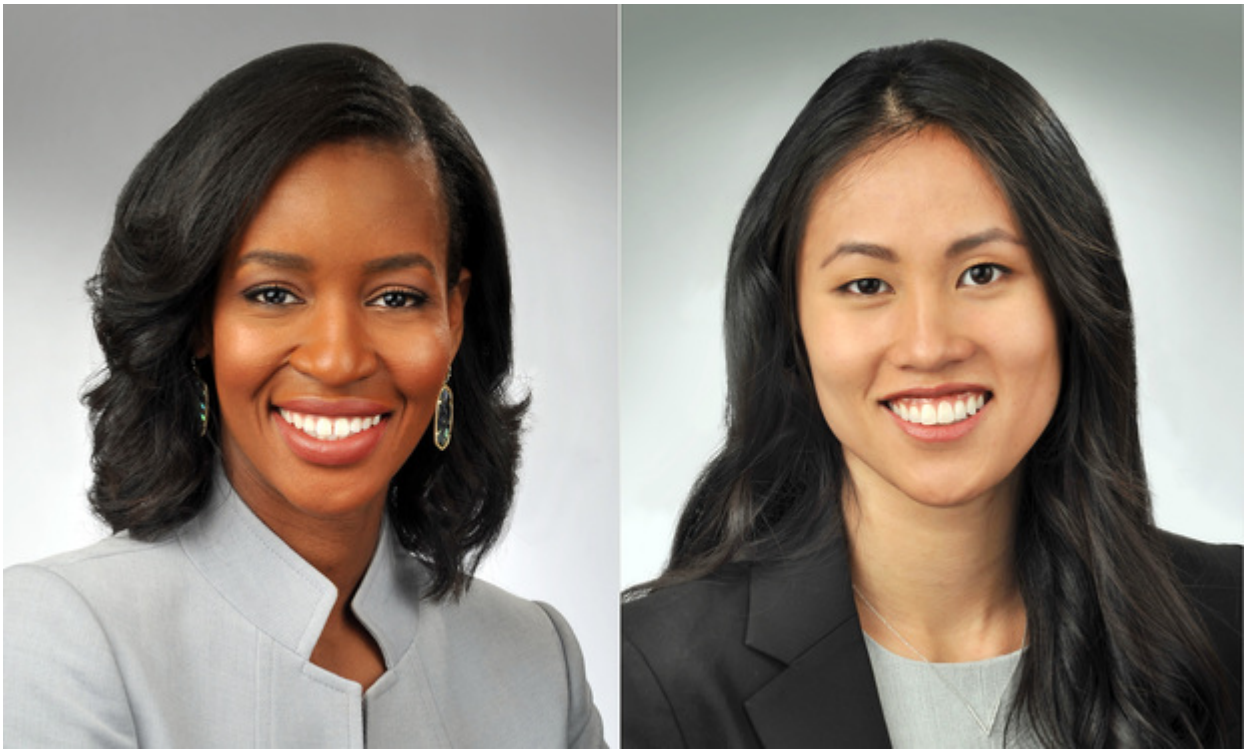
Employers should obtain acknowledgments that each employee understands he or she must report accidents immediately, said Angelo Filippi, an attorney with Kelley Kronenberg in Fort Lauderdale, Fla. The acknowledgment should provide consent to an investigation of the accident, including inspection of the premises on which the accident occurred, he said.

Employers also should check with their workers' compensation and general liability brokers or carriers to ensure that all appropriate coverages apply to those employees who work from home, said Ellen Bronchetti, an attorney with McDermott Will & Emery in San Francisco.

To Telework or Not: That Is a Good Question

Workers not at high risk for COVID-19 may generally be subject to employers' business decisions on telework, but health concerns or disability may implicate additional legal considerations.

By **Crystal S. McElrath and Nichole C. Novosel** | October 28, 2020



Crystal McElrath (left) and Nichole Novosel of Swift, Currie, McGhee & Hiers, Atlanta. (Courtesy photos)

In the face of the ongoing COVID-19 pandemic, many employers have had to consider both the business and legal implications of ceasing operations versus shifting to telework versus attempting to continue in-person work. Recent legislation and executive orders have addressed the protections of employees who cannot telework while at home due to COVID-19 exposure and/or lack of childcare, but this gives rise to questions concerning if and when an employer is obligated to offer telework to employees.

Federal Laws at Play

Among other things, the Americans with Disabilities Act, as amended in 2008 (ADA) and the Rehabilitation Act generally prohibit employment discrimination against individuals with disabilities in the workplace by prohibiting employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat." Employers also are required to provide reasonable accommodations for individuals with disabilities.

In the context of a public health pandemic, the Equal Employment Opportunity Commission (EEOC)—which enforces the ADA—acknowledges different rules may apply. Accordingly, during the COVID-19 pandemic, an employer is permitted to encourage all employees to telework as an infection-control strategy to the extent feasible. Likewise, employees with disabilities may request telework as a reasonable accommodation, even if an employer does not actively encourage teleworking or perhaps has no teleworking policy in place. Even in a pandemic, however, there is no blanket law requiring employers to offer telework options. Thus, a fact-specific inquiry will often determine whether teleworking is a feasible option.

Availability of Accommodations

An employee with a medical condition placing them at high risk may be entitled to accommodation per the ADA, but there are still several considerations before an employer is obligated to provide online or remote work. The employee must first request an accommodation. The ultimate goal of the accommodation must be to allow the employee to perform the essential functions of their job. An employer should then engage in (and document) the interactive process of determining the availability of teleworking options or other accommodations. The accommodations should ensure the employee can continue to perform the essential functions of their job, while heeding medical recommendations regarding their medical condition/COVID-19 exposure without placing undue hardship causing significant difficulty or expense for the employer. If an accommodation poses an undue hardship, an employer must then consider other available accommodations. For example, an employer may offer unpaid leave as a reasonable accommodation for an employee whose medical condition makes them too high risk to report to work in person.

Compliance With ADA Regulations Regarding Disability-Related Inquiries

Employers must also adhere to the ADA's limitations on disability-related inquiries. Accordingly, employers are prohibited from inquiring about whether an employee is high risk, even if their intention is to identify those employees to offer a reasonable accommodation, such as telework. However, during a public health pandemic, an employer may be permitted to survey employees to identify those who may be susceptible to pandemic-related complications in pandemic planning, such as creating a telework policy. The EEOC provides specific instruction on ADA-compliant ways for employers to ensure the inquiries are not disability-related.

Minority and/or Elderly Employees

Employers should not single out minority and/or elderly workers in order to *prohibit* them from coming to work, even with the best of intentions, solely because they have a condition placing them at higher risk. Again, employers are not mandated to act unless an employee requests an accommodation or uses some language to suggest a disability is interfering with their job performance.

Fear of Direct Threat

Where an employer fears a "direct threat" (defined as a significant risk of substantial harm to the employee's own health due to their disability), an employer may unilaterally exclude the employee from the workplace. In this rare instance, the employer would perform a multifactor analysis determining no other reasonable accommodations would eliminate or reduce the risk such that it would be safe for the employee to return to the workplace while permitting performance of essential functions.

Employees Concerned About Family's Health

Employers' or employees' concerns for the health of family members are covered by even fewer laws. The Emergency Paid Sick Leave Act, included in the Families First Coronavirus Response Act (FFCRA) provides up to two weeks (80 hours) of paid sick leave if an employee is caring for an individual quarantined (pursuant to federal, state or local government order or advice of a health care provider) and/or experiencing COVID-19

symptoms and seeking a medical diagnosis. For employees who fear that returning to their workplace might create additional exposure for a family member with a high-risk condition, neither the ADA nor the FFCRA apply.

Employee Morale and Limiting Risk

Even where an employee has no medical condition or medical documentation entitling them to the aforementioned legal protections, employers may still want to consider whether teleworking might increase employee morale or limit the risk of an outbreak and duty to contact trace. Employers may also need to consider whether allowing some employees to telework while denying others' requests could appear discriminatory vis à vis race, gender or any other protected class.

In short, individuals who are worried about contracting COVID-19—but have no specific history of health concerns that place them at high risk—are generally subject to the business decisions of the employer with respect to the availability of telework. However, the existence of a health concern or disability placing an employee (and not just a family member) at higher risk of contracting COVID-19 may implicate additional legal considerations.

Crystal McElrath is a partner at Swift, Currie, McGhee & Hiers. She practices workers' compensation defense, as well as employment law defense and counseling, specializing in disability and leave laws.

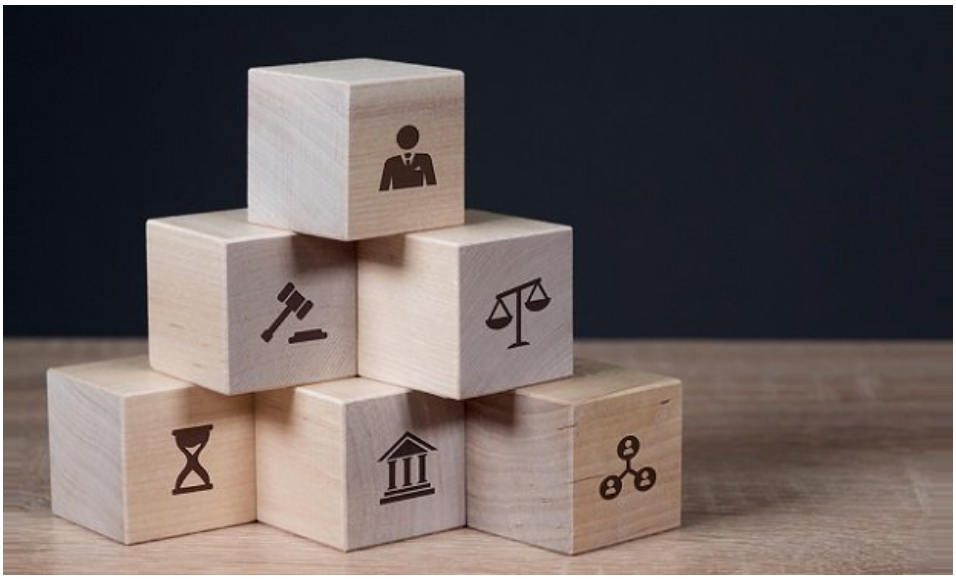
Nichole Novosel is an attorney for Swift, Currie, McGhee & Hiers, practicing workers' compensation defense, as well as employment law defense and counseling.

Best Practices

Navigating employment decisions during the coronavirus pandemic: Key aspects for HR managers

There is no one-size-fits-all guide to COVID for employers, but here's an overview of some employment issues to know.

By **Nichole Novosel, Esq., Crystal McElrath, Esq. and Anandhi Rajan, Esq.** | June 23, 2020 at 10:05 AM



many of the laws that existed before the COVID-19 pandemic have been relaxed and, simultaneously, many new laws have popped up in response to this unprecedented global crisis. (Photo: Shutterstock)

For businesses of all sizes and types, the impact of COVID-19 on the workforce is a chief concern. Employers must balance the challenges of increased unemployment claims and employment reductions while addressing bottom lines and other business concerns. They must also follow federal and state laws. While state law cannot be directly contrary to federal law, states can impose additional requirements or protections for their constituents and choose what to implement where federal law is permissive.

Related: Employer compliance beyond CARES and FFRCA: Don't forget the basics

For instance, the recently enacted federal stimulus package, specifically the Coronavirus Aid, Relief and Economic Security (CARES) Act affords states "significant flexibility…to amend their laws to provide [Unemployment Insurance] benefits in multiple scenarios related to COVID-19…[F]ederal law allows states to pay benefits where (1) An employee temporarily ceases operations due to COVID-19, preventing employees from coming to work; (2) An individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) an individual leaves employment due to a risk of exposure or infection or to care for a family member."

However, many states have expanded the unemployment eligibility to include only one or two of these. As such, there is no one-size-fits-all decision for employers. This article provides a brief overview of some employment issues related to COVID-19.

Notice requirements and the WARN Act

Some states, such as Pennsylvania and South Carolina, have enacted new laws requiring employers to provide notice to employees about availability or entitlement to unemployment compensation benefits either at the time of separation from employment or when an employee's work hours are reduced. States with these requirements generally also specify the timing and method of delivery for these notices. Employers should consult their local department of labor (DOL).

Employers must also navigate federal notice requirements regarding the layoff itself. The Worker Adjustment and Retraining Notification (WARN) Act requires covered employers with 100 or more full-time workers (or 100 full- and part-time workers who work at least a combined 4,000 hours per week) to provide written notice to protected employees at least 60 calendar days in advance of covered employment losses, such as plant closings and mass layoffs. A layoff of less than six months does not trigger the federal WARN Act, but employers are expected to issue notice when it becomes foreseeable that the layoff or closing will last more than six months. As with other laws discussed, some states have WARN laws that expand covered employers by reducing the minimum size/number of employees.

A WARN notice is typically triggered in plant closings and mass layoffs, including a plant shutdown resulting in an employment loss of 50 or more employees during any 30-day period, layoffs of 500 or more employees during any 30-day period or layoffs of 50-499 employees that totals 33% of the total active workforce. An employer is also required to provide WARN notice when it reduces the work hours of 50 or more workers by 50% or more for each month in any six-month period.

Additionally, an employer is required to give WARN notice if it has a series of small, separate and related terminations or layoffs over a 90-day period that would not be covered individually, otherwise known as the "aggregation" rule.

While there are exceptions to the 60-day requirement, notice must still be provided as soon as practicable, and the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling the other notice requirements. The three exceptions are a faltering company, unforeseeable business circumstances or a natural disaster.

Employers face uncertainty regarding whether the COVID-19 pandemic would qualify as an exception to the 60-day notice requirement. Because the natural disaster exception requires a direct relationship between the disaster and plant closing or mass layoff, the unforeseeable business circumstances exception is more applicable to decisions made due to COVID-19. However, the argument weakens with time, as the unforeseeable aspect diminishes.

Additionally, employers should be mindful of state laws. New York's DOL has announced that its state WARN notice requirements are not suspended by the COVID-19 pandemic. California created an "unforeseen business circumstance" exception to its state WARN Act.

Verifying employment information and IRCA

The Immigration Reform and Control Act (IRCA) of 1986 generally makes it unlawful for a person or entity to knowingly hire (including subcontractors), recruit, refer for a fee for U.S. employment or continue to employee any alien who is unauthorized to work. The Act also requires employers to verify the work status of an individual and complete Form I-9, Employment Eligibility Verification. Form I-9 requires prospective employees to attest they are authorized to work and provide proof of identity and employment eligibility. Employers must then physically examine each document in the presence of the employee to determine if it reasonably appears to be genuine and relates to the employee.

The federal government recently implemented a temporary policy permitting employers taking physical proximity precautions related to COVID-19 to defer the physical presence requirements associated with the Form I-9, including reverification. An employer may also designate an authorized representative to act on their behalf to complete and sign the Form I-9, but the employer is liable for any violations in connection with the form or the verification process. In addition, employers served with a Notice of I-9 Inspection during March 2020 were granted an automatic extension until May 18, 2020. Beginning on May 1, identity documents found in List B of Form I-9 set to expire on or after March 1, 2020, and not otherwise extended by the issuing authority, can be treated as if the employee presented a valid receipt for an acceptable document for Form I-9 purposes.

Employers that elect to defer the physical presence requirements must remotely inspect the documents provided (via video conference, email, fax, etc.). They must also obtain, inspect and retain copies of the documents within three business days and note “COVID-19” as the reason for the physical inspection delay. Once normal operations resume, all employees onboarded using remote verification must report to their employer within three business days for in-person verification of identity and employment eligibility documentation. Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the additional information field on the Form I-9 or to section 3 as appropriate.

Employers should note this option applies only to employers working remotely with no employees physically present at the work location, and the employer must provide written documentation of their remote onboarding and telework policy for each employee. There are no exceptions, but if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, the Department of Homeland Security (DHS) will evaluate the issue on a case-by-case basis.

Unemployment and the CARES Act

The CARES Act was signed into law on March 27, 2020. While the Act expands states’ flexibility in determining eligibility and administering unemployment insurance, unemployment insurance is still governed by state law, meaning states ultimately choose how to implement the CARES Act.

Future unemployment insurance costs

The federal programs established by the CARES Act are fully funded by the federal government, and states are prohibited from charging an employer.

With respect to employer filed (partial) claims, laws vary. Some states have short-term compensation programs to provide unemployment benefits. Others, like Georgia, do not have such a program. Instead, Georgia enacted an emergency rule requiring employers to file partial claims on behalf of their employees when employees' hours are reduced, with employers not being charged on their DOL account. Employers found in violation of this rule will be required to reimburse the DOL for the full amount of unemployment insurance benefits paid.

Important employee classification considerations

The Pandemic Unemployment Assistance (PUA) program under the Act provides 29 weeks of benefits and eligibility for self-employed individuals, independent contractors, gig workers and other individuals who otherwise would not qualify for unemployment benefits under state or federal law. To be eligible, among other requirements, individuals must demonstrate they are otherwise able to work and available for work within the meaning of applicable state law, except that they are unemployed, partially unemployed or unable or unavailable to work due to COVID-19.

Employers should make sure to understand an employee's classification because it determines who files for unemployment. Employers may be required to file on behalf of their employees, while individual contractors or self-paid individuals file on behalf of themselves or their company. Additionally, failure to file for an employee could have consequences in certain states, such as Georgia.

Federal relief options

For qualified individuals, the Federal Pandemic Unemployment Compensation (FPUC) program under the Act provides an additional $600 benefit per week. The Pandemic Emergency Unemployment Compensation (PEUC) program extends the length of time an individual may receive unemployment compensation to 13 weeks after they exhaust their regular state unemployment. It also mandates states offer flexibility in meeting eligibility requirements related to "actively seeking work" if an applicant's ability to do so is impacted by COVID-19. These benefits can, and often, pay better than an employee's regular job, so employers should not be surprised if employees request to be laid off. However, despite an employee's incentive to receive increased unemployment benefits, some employers are incentivized to keep employees working or at least on their payroll.

For qualifying small businesses, the Small Business Administration (SBA) and U.S. Department of the Treasury have implemented the Paycheck Protection Program (PPP) through the CARES Act to incentivize employers to keep workers on the payroll. Neither the government nor lenders will charge fees and no collateral or personal guarantees are required. The loan will be fully forgiven if all employees are kept on the payroll for eight weeks and the employer uses the funds for payroll costs, interest on mortgages, rent and utilities. At least 75% of the forgiven amount must have been used for payroll.

Any reduction in the number of full-time equivalent employees is deducted on a pro-rata basis. Likewise, any reductions in salary greater than 25% during the eight-week covered period are totaled and deducted on a dollar-for-dollar basis from the loan amount forgiven.

Essentially, the advice for human resources managers is to maintain a relationship with local employment counsel and monitor state laws. Assume both state and federal laws will continue to evolve — as they have for the last several weeks and months, in

response to new economic and public health data. On the whole, many of the laws that existed before the COVID-19 pandemic have been relaxed and, simultaneously, many new laws have popped up in response to this unprecedented global crisis. Know that these laws are a new frontier for everyone from legislators to CEOs, and you are not alone in trying to make sense of them all. ***Crystal McElrath*** *(crystal.mcelrath@swiftcurrie.com) is a partner at* ***Swift, Currie, McGhee & Hiers, LLP****. She practices workers' compensation defense, as well as employment law defense and counseling, specializing in disability and leave laws.*

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