

Health Law Webinar

Federal Employment Law Issues in the Evolving
COVID-19 Environment

November 11, 2020

Fredrikson
& BYRON, P.A.

Agenda

- Current rules and guidance
- Employee Leave and Accommodation
- Health and Safety Considerations relating to availability of PPE
- Looking into the “Crystal Ball”
- Q&A

State and Local

- Focus today is federal guidance, etc.
- But be sure to stay updated on your state and local guidance regarding COVID-19 protocols and the other issues we cover today

CDC Guidance



The screenshot shows the CDC website interface. At the top left is the CDC logo with the text 'Centers for Disease Control and Prevention' and 'CDC 24/7: Saving Lives. Protecting People™'. To the right is a search bar. Below this is a teal header for 'Coronavirus Disease 2019 (COVID-19)'. A navigation bar contains links for 'Your Health', 'Community, Work & School', 'Healthcare Workers & Labs', 'Health Depts', and 'Cases & Data'. The main content area is titled 'COMMUNITY, WORK & SCHOOL' and 'Businesses and Workplaces'. The subtitle is 'Plan, Prepare, and Respond'. It includes a date 'Updated June 23, 2020', a language selection dropdown, and a 'Print Page' link. A social media icon for Facebook is also present. Below the text is a photograph of a person in a red shirt standing in front of a storefront. On the left side, there is a sidebar menu with options: 'Community, Work & School', 'Community Mitigation Framework', 'Cleaning & Disinfecting', 'Businesses & Workplaces' (which is highlighted), 'Guidance for Businesses & Employers', 'Employer Information for Office Buildings', and 'Considerations for Restaurants & ...'.

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

OSHA Guidance



Guidance on Preparing Workplaces for COVID-19

[https://www.osha.gov
/Publications/OSHA3
990.pdf](https://www.osha.gov/Publications/OSHA3990.pdf)

OSHA

- General duty v. specific regulations
 - Document precautions
 - Whistleblower complaints
- Reporting
- Protection from retaliation

OSHA: Right to Refuse Work

- Employee asked the Employer to eliminate the danger, and the Employer failed to do so; and
- Employee refused to work in "good faith." This means that Employee must genuinely believe that an ***imminent danger*** exists; and
- A reasonable person would agree that there is a real danger of ***death or serious injury***; and
- Not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Mandatory Testing

- Difference between COVID-19 v. antibody testing
- Cannot require antibody testing
- Can require COVID-19 testing/screening if done the right way
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Mandatory COVID-19 Vaccination

- Consider now whether to require once available
- Must allow for religious and disability exemptions
- ADA and Title VII (and similar state/local laws)

FFCRA & Health Care Providers

- Original definition of exempt “health care providers” extremely broad
- Court decision cast doubt
- Revised rule narrowed definition
- In effect till end of 2020 unless extended

CV-19 Interplay – Leaves and Accommodations

- FMLA, ADA, *State Law*, and company personal leave interplay with CV-19 conditions. How does this all work?
- ***FMLA – leaves of absence (continuous / intermittent) – not accommodations***
 - Eligible employee (12 mo. (+) 1250 hours)
 - Employee serious health condition – can't perform essential functions
 - Care for spouse, child, parent with serious health condition

COVID-19 Interplay – Leaves and Accommodations

- **ADA / State & Local Leave Laws – Accommodations (could be a leave)**
 - Disability = physical or mental condition that materially limits a major life activity. **Duty to accommodate.**
- Other Personal Leaves (company provided)

Employee Medical Information

- What can you “legally” request from an employee to confirm she is high-risk, has restrictions/need accommodations specific to COVID-19?

Responding to COVID-19 Restrictions

- How does an employer respond to employees who are patient-facing and have provided a doctor note advising the following:
 - *We recommend that our patient not work with any COVID19 positive patients or patients under investigation; or*
 - *We recommend that our patient be able to work from home and avoid contact with COVID19 positive patients.*

Responding to COVID-19 Restrictions

- What about request for accommodation related to a close family member?
- But consider potential leave entitlements under “traditional” FMLA

Looking into the Crystal Ball: What's Coming in 2021?

- Expanded FFCRA?
- (Unfortunately) Agency Charges and Litigation
 - RIFs and staffing reductions
 - Leave and accommodation issues
 - “Whistleblower” allegations
 - More Employer decisions adversely impacting employees

Looking into the Crystal Ball: What's Coming in 2021?

- Race/social justice issues
 - Expanded focus on diversity and inclusion
 - Recruitment
 - Charges/litigation?

Questions?

Fredrikson
& BYRON, P.A.

Presenters



Brian T. Benkstein

612.492.7096

bbenkstein@fredlaw.com



Kendra D. Simmons

515.242.8919

ksimmons@fredlaw.com