



WORKPLACE GUIDANCE WEBINAR SERIES



COVID-19 and Return to Work Challenges

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COVID-19 and Return to Work Challenges

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DISCLAIMER

These materials were prepared by the law firm of Reminger Co. LPA for attendees' reference during this seminar. This presentation, these materials, and related discussions are informational and educational in nature and are not intended to provide legal advice for any specific situation. Professional advice should be obtained before attempting to address any particular legal situation or problem. Furthermore, because requirements at the federal, state, and local levels are continually changing during this COVID-19 pandemic and some rules/regulations are industry-specific, please consult counsel prior to relying on the information contained herein.



COVID-19 & Return to Work Challenges

TODAY'S AGNEDA

1. New Ohio “Stay Safe Ohio” Order
2. Preparing the Workplace and Preparedness & Response Plans
3. New Requirements and Recommendations
4. Common Concerns and Frequently Asked Questions
5. Legal Risks and Best Practice Strategies to Reduce Exposure
6. Paid Leave Requirements – Families First Coronavirus Response Act

Reopen Responsibly in Ohio

The ***Stay Safe Ohio*** Order signed on April 30th and in effect through May 29th takes the place of the prior ***Stay at Home*** Order and keeps the prior order in effect but permits certain business sectors to resume operations, provided they follow additional industry-specific guidelines (www.businesshelp.ohio.gov)

- *May 1* – **Healthcare Providers** (doctor visits, well checks, out-patient surgeries, imaging, diagnostic tests and surgeries if not performed would cause a threat to life, threat of spread of cancer or permanent dysfunction, presence of severe symptoms inhibiting daily activities, etc.)
- *May 4* – **Manufacturing, Construction, Distribution, General Office** (social distancing, staggered schedules, work from home whenever possible, require employees to stay home if symptomatic, frequently disinfect, no buffet in cafeteria, cancel/postpone in person events, etc.)
- *May 12* – **Retail, Consumer, Services** (specify hours for at-risk populations, ask customers/guests not to enter if symptomatic, discontinue self-service food stations and do not reopen food courts, clean high touch items (e.g., carts, baskets), specify hours for at-risk population, etc.)
- *May 15* – **Outdoor Dining, Hair/Nail Salons, Barbershops, Day Spas, Other Personal Services**
- *May 21* – **In-Door Dining Services**

Preparing the Workplace for a Safe Return

- The federal Occupational Safety & Health Administration (OSHA) and Center for Disease Control are point agencies for issuing guidance on preventing the spread of COVID-19 in the workplace.
 - Both federal agencies, in coordination with state health officials, have promulgated numerous guidances to help employers.
 - What is COVID-19? How is it spread? How can you avoid infection?
 - These questions have been addressed *ad nauseum* by the media, so for today's purposes: It is a coronavirus for which there is no vaccine and to which everyone is at risk. A person can become infected through respiratory droplets (coughs, sneezes, etc.) or by contacting a surface with the virus on it and then touching your mouth, nose, or eyes. (CDC factsheet – April 2020)
- In order to prepare the workplace for the safe return of employees furloughed by the COVID-19 outbreak, employers should start by consulting OSHA's "Guidance on Preparing Workplaces for COVID-19".

Reducing Your Employees' Risk of Exposure

- OSHA recommends that all employers take the following steps to minimize the possibility of COVID-19 infection and transmission:
 - Develop an infectious disease preparedness and response plan
 - Develop policies and procedures for prompt identification and isolation of sick employees
 - Develop, implement, and communicate about workplace flexibilities and protections
 - Implement “workplace controls”
 - Follow existing OSHA standards
- (Note OSHA has also issued several industry specific guidances on the virus: restaurants, retail, construction, manufacturing, health care)

Infectious Disease Preparedness and Response Plans

- Consider all available recommendations from federal, state, and local health agencies for protecting the workplace from COVID-19 and decide how best to incorporate that advice into a workplace-specific plan.
- Perform a comprehensive risk assessment of your “workplace” and the potential environments with which your employees interact:
 - Venues might involve off-site locations, presence of third-party vendors, remote customer locations, intra-state travel, interaction with general public, etc.
 - This process invariably requires consistent feedback and participation from front-line employees themselves, as they are the individuals who know each venue best and the particular challenges each presents for direct contact with surfaces and/or individuals from whom COVID-19 could be spread.
- Consider how to deal with sudden, increased absenteeism (cross-train workers).
- Evaluate unique susceptibility or need for social distancing.
- Consider effect of supply chain disruption.

Five Mandatory Protocols

- 1. *Face coverings*** for employees (required unless an exception applies) and clients/customers (at the discretion of the business).
- 2. *Daily health assessment*** by employers and/or employees (self-evaluation) – make sure there is documentation/record-keeping.
- 3. *Good hygiene*** at all times – hand washing and social distancing (along with other industry-specific mandates).
- 4. *Clean and sanitize*** workplaces throughout the workday and at the close of business or between shifts.
- 5. *Limit capacity*** to a maximum capacity (as established by employer or 50% of fire code) and use appointment setting where possible to limit congestion.

Face Mask Exceptions

- Face coverings prohibited by law or regulations
- Masks in violation of documented industry standards
- Masks in violation of documented safety policies
- Masks not advisable for health reasons
- Masks not required when an employee working alone
- Functional/practical reason not to wear a mask

****Document reason for an employee not wearing a face mask***

Daily Health Assessments

- Every employee is expected to conduct a “health assessment” before coming to work each day.
- Assessments should include taking temperature, monitoring for fever, and watching for cough or trouble breathing.
- It is recommended to take your temperature and/or complete a questionnaire about symptoms and possible contact with others who are symptomatic or have been diagnosed with COVID-19.
- Employers should “flag” employees who do not pass the assessment and make sure they do not enter the workplace.

Other Mandates

- Designate 6-foot distances with signage, tape, etc.
- Stagger shifts/breaks to achieve proper social distancing.
- Hand sanitizer and sanitizing products should be readily available.
- Separate operating hours for vulnerable populations.
- Continue to have people work from home when possible.
- Send employees home immediately if symptomatic.

****Order states that new protocols will be enforced by local health departments and police; violation of the order is a second degree misdemeanor, punishable by a fine of up to \$750 and up to 90 days in jail.***

Commonly Asked Questions

- How do I re-employ employees who have been laid off or furloughed?
- Can I allow employees to continue to work remotely?
- What if employees refuse to return to work because they are “fearful” even though work is available?
- Can we ask for a doctor’s note if employees say they are sick or high risk?
- What should I do to prepare the workplace (i.e. how much sanitizer and cleaning solutions should I buy or make)?
- Do I have to modify the physical workspace? Do I have to force people to stay separated?

Commonly Asked Questions

- Do I have to provide face masks and pay for them?
- What if employees refuse to wear face masks, get their temperature taken, or follow any of the safety protocols?
- What written documents and policies do I need to address COVID-19?
- How do I best communicate with my employees about all this?
- How do I conduct the daily health assessment? Where should I store on-site medical exam results?

Recalling Employees – What to Consider

- For PPP loan forgiveness, loan recipients must ***restore staffing levels*** by June 30, 2020.
- Document ***business-related, objective criteria*** used to decide who you will reinstate/bring back to work.
- ***Don't make assumptions*** about employees not wanting to return to work (e.g., older or pregnant workers).
- Keep in mind employees coming back to work could be ***eligible for new paid leave (FFCRA)***.

Refusal to Return – What to Do Now

- Ask – ***What is the exact reason the employee is refusing to return and is this person protected by any law (i.e. requiring an accommodation)?***
 - Americans with Disabilities Act (ADA) – does the employee have a qualified disability?
 - Family Medical Leave Act (FMLA) – does the employee have a serious health condition or is the employee taking care of a family member with a serious health condition?
 - PSL or EFML – is the employee's refusal based on a qualifying reason?
 - OSHA – is the employee's refusal based on legitimate safety concerns?
 - NLRA – are there several employees who are refusing to return to work, and could this be considered "protected concerted activity"?
- If no protection under existing law and employee refusing to return because of a generalized fear, may be able to discharge employee.
- Employee cannot continue to collect unemployment (employer must report to ODJFS that employee is not returning despite available work).

High Risk Employees – How to Handle

- Employee considered “high risk” (older or underlying medical condition) does not want to return to work – ***what should you do?***
 - How about an employee who is caring for someone who is high risk?
- May qualify for Emergency Paid Sick Leave (PSL) if doctor advised the employee to self-quarantine or another qualifying reason applies.
 - Or if an employee is caring for someone who has been quarantined.
- May be entitled to a reasonable accommodation (e.g., work-from-home, temporary transfer to a different position, additional time off).
 - ADA analysis will apply (interactive process and undue hardship).

Identification and Isolation – Best Practices

- Requiring COVID-19 testing/temperature taking does not violate any laws (per EEOC).
- Employer may (and should) ask about specific symptoms related to COVID-19 – fever of 100.4, cough, chest congestion, shortness of breath, fatigue, sore throat, loss of taste/smell, gastrointestinal symptoms.
- Require employee to report to HR (or other point of contact person) if experiencing symptoms or came into contact with someone who has tested positive.
- Immediately report employee to the local health department (mandatory under new Order to report suspected exposure and actual cases).
- Notify anyone in the infected employee's contact circle for last 14 days.
- Shut down work areas and conduct deep cleaning.
- Request release from sick employee before identifying by name.
- Sick employee must be symptom-free for 72 hours and 7 days must have passed since symptoms began (before returning).

OSHA STANDARDS

- OSHA has divided job tasks into four risk exposure levels ranging from low, to medium, high and very high.
- The risk level depends on the type of work being performed, the need to be in contact with people within the six-foot recommended barrier, and the requirement for contact with people known or suspected to be infected with the virus.
- Based on a job's level of risk, OSHA has released guidelines about how best to protect employees. See www.osha.gov for more information.

Quick Update on Unemployment Benefits and Workers Compensation

- **Ohio Department of Job & Family Services**

- Over 1 Million Ohioans have filed for unemployment
- New enhanced unemployment eligibility and compensation available through the CARES Act (and the Pandemic Unemployment Assistance)
- Expanded eligibility retroactive to 2/2/20 and \$600 retroactive to 3/29/20
- "I'm afraid to go back to work" not enough to be eligible for benefits

- **Ohio Bureau of Workers' Compensation**

- Case-by-case assessment and review of specific facts
- Must show (1) exposed to COVID-19 in the course and scope of employment; (2) the exposure at work caused employee to contract virus; and (3) the employee's employment involved a peculiar risk of exposure to the virus different from that which the public and others generally face

Six Ways to Reduce Legal Risks

- 1. Coordinate task force and conduct training:** Designate a COVID-19 “team lead” and “tele-train” managers and supervisors on all safety actions.
- 2. Create policies and uniformly enforce them:** Develop COVID-related policies on enhanced safety protocols, new paid sick/family leave, how to handle positive test, remote work, etc.
- 3. Ensure OSHA/CDC guidelines are being met:** Assess workplace risk levels; prepare safety plans and protocols; ensure daily distancing, deep cleaning and other sanitation/disinfection requirements are being met.
- 4. Be aware of privacy protections:** Monitor and protect confidential health information; create operating procedure or record-keeping logs that safeguard employee medical documentation.
- 5. Bring employees back to work based on business necessity:** Careful not to select employees (laid off or furloughed) for recall using a method that could be perceived as discriminatory (or create a disparate impact).
- 6. Avoid comments and conduct that could be perceived as retaliatory:** When an employee takes time off for COVID-related reasons, be sure not to say/do anything that could be potentially viewed as retaliation.

FAMILIES FIRST
CORONAVIRUS
RESPONSE ACT

BASICS

- Effective April 1 to Dec. 31, 2020
- Imposes new *paid* sick leave & *paid* family medical leave obligations
- Potentially apply to nearly Six Million businesses, collectively employing over 60 Million workers



FAMILIES FIRST
CORONAVIRUS
RESPONSE ACT

BASICS

- Requires **up to 80 hours of *paid* emergency sick leave (“PSL”)** for six COVID-19-related qualifying reasons
- Provides **12 weeks of job-protected *paid* emergency family medical leave (“EFML”)** for those unable to work due to childcare obligations from closed school or daycare
- **Quarterly tax credits** equal to 100% of qualified PSL & EFML wages paid, and health insurance continuation costs



COVERED COMPANIES

- With LIMITED exceptions, **ALL U.S. business with *less than 500 employees***
- Measured *at the time* employee *would take leave*
- **Exclusions for:**
 - *Health Care Providers*
 - *Emergency Responders*

EXCLUSIONS & EXEMPTIONS

LIMITED Exemption for:

- Small business with *less than 50 employees*
- From *childcare/school-closure* PSL/EFML ONLY
- Leave “would jeopardize viability of the business as a going concern”
 - Financial obligations > available revenue **and** cause employer to cease operating *at minimal capacity*
 - Absence of employee(s) with specialized skill/knowledge poses *substantial risk* to operational capacity
 - Insufficient substitute workers when & where needed to perform services *as needed to operate at minimal capacity.*

ELIGIBLE EMPLOYEES

- ALL employees *immediately* eligible for **PSL**
- Employees *employed for 30 calendar days* are eligible for **EFML** (including time as a “temp”)
- Unable to work *for qualifying reason(s)*

PAID SICK LEAVE – “PSL” - Qualifying Reasons -

- (1) Subject to federal, state, or local **quarantine** or **isolation order**
- (2) Subject to **self-quarantine** advised by health care provider
- (3) Experiencing **COVID-19 symptoms** *and* **seeking diagnosis**
- (4) **Caring for another individual** who is subject to (1) or (2)
- (5) **Caring for son/daughter due to school or daycare closure**
- (6) Experiencing other “substantially similar condition” specified by HHS Sec.

EMERGENCY FAMILY MEDICAL LEAVE – “EFML” - Qualifying Reason -

1. Employee is unable to work or telework due to the **need to care for a child** (son or daughter) because the child’s **school or place of care has been closed** or childcare provider is unavailable
2. ...

AMOUNT of LEAVE

PSL

- Essentially **2 workweeks**
 - **Full-time employees** - normally scheduled 40 hours a week or more - entitled to **80 hours of PSL**
 - **Part-time employees** - normally scheduled less than 40 hours per week - entitled to PSL for **average number hours worked in 2-week period**

EFML

- A total of **12 workweeks** between April 1, 2020 and December 31, 2020
 - **First 2 weeks/10 days of EFML "UN-Paid"** (*Subject to employee option to substitute PSL or accrued PTO, vacation, personal, or sick leave*)
 - **Subsequent 10 weeks/50 days of EFML are Paid**
- For number of hours employee "would otherwise be normally scheduled to work"

RATE of PAY for LEAVE

Certain PSL

- Where based on (1) a government quarantine, (2) healthcare-advised self-quarantine, or (3) COVID-19 symptoms or diagnosis - **paid at employee's "regular rate" of compensation** per FLSA

Certain PSL & ALL EFML

- Where "caretaker" leave, based on (4) providing care for another quarantined individual, or (5) for childcare due to school/daycare closure – **paid at 2/3 regular rate**

LIMITS on PSL & EFML

PSL:

- **\$511 per day** or **\$5,110 in aggregate** per employee for leave due to (1) government quarantine, (2) healthcare quarantine, (3) COVID-19 symptoms/diagnosis
- **\$200 per day** or **\$2,000** in aggregate per employee for leave due to (4) caregiving, (5) childcare/school closure

EFML:

- **\$200 per day** or **\$10,000** in aggregate per employee
- Effectively \$12,000 aggregate once PSL included

Circumstances When PSL & EFML DO NOT APPLY

- NOT retroactive before April 1, 2020, nor available after Dec. 31, 2020 and do NOT carry over from one year to the next
- Employee *able to telework* with employer's agreement
- Self-Quarantine: unilaterally deciding to self-quarantine *without* seeking medical advice
- School/Daycare Closure: another suitable person is available to care for the child during the period of leave

Circumstances When PSL & EFML DO NOT APPLY

- Unused leave NOT available upon employee's termination, resignation, retirement, or separation
- Available ***only*** where employee would otherwise be able to work or telework, so **NOT available where company *does not have work***, either due government directive or other circumstances
 - Where company *closes a worksite*, no leave after date of closure, *regardless* of why closed & even if employee requested leave before the closure
- Where business remains open, but *employees furloughed or hours reduced* without termination
- FFCRA contemplates *Unemployment Compensation* in these circumstances

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Enforcement & Penalties

Anti-retaliation protection (against discharge, discipline, or discrimination) for taking leave / filing complaint / testifying

PSL - considered *unpaid minimum wages* subject to **FLSA penalties**:

- Unpaid wages
- Liquidated "double" damages
- Attorneys' fees
- Injunctive relief (reinstatement)
- Administrative enforcement by DOL Wage & Hour Divis.
- Civil lawsuit by employee(s)

EFML - subject to traditional **FMLA penalties**:

- Lost wages, salary, & benefits
- Liquidated "double" damages
- Attorneys' fees
- Injunctive relief (reinstatement)
- Administrative enforcement by DOL
- Civil lawsuit by employee(s) (ONLY companies with >50 employees)

PSL / EFML COMPARISON

Qualifying Reason – Employee Unable to Work/Telework due to:	PSL	EFML	Rate of Pay	Max. Limits
(1) Subject to Federal, State, or Local COVID-19 quarantine/isolation order;	Yes, eff. 2 wks, up to 80 hrs	NO	Regular Rate	\$511 per day \$5,110 in aggregate
(2) Subject to COVID-19 self-quarantine advised by health care provider	Yes, eff. 2 wks, up to 80 hrs	NO	Regular Rate	\$511 per day \$5,110 in aggregate
(3) Experiencing COVID-19 symptoms and seeking medical diagnosis	Yes, eff. 2 wks, up to 80 hrs	NO	Regular Rate	\$511 per day \$5,110 in aggregate
(4) Caring for another individual subject to government/healthcare quarantine	Yes, eff. 2 wks, up to 80 hrs	NO	2/3 Regular Rate	\$200 per day \$2,000 in aggregate
(5) Caring for son/daughter due to school/daycare closure	Yes, eff. 2 wks, up to 80 hrs	YES, 2 wks unpaid 10 wks paid	2/3 Regular Rate	\$200 per day PSL: \$2,000 in aggregate EFML: \$10,000 in aggregate
(6) Experiencing other substantially similar condition per U.S. Sec. HHS	Yes, eff. 2 wks, up to 80 hrs	NO	2/3 Regular Rate	\$200 per day \$2,000 in aggregate

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QUESTIONS?

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RESULTS • PERIOD •

Future Presentations

Tues. May 26 , 2020 @ 12:00 pm

Remote Work Policies, Best Practices, & Considerations,
Stella Skaljac

Additional Topics & Dates TBD