



# WORKPLACE GUIDANCE WEBINAR SERIES



Remote Work Policies, Best Practices & Considerations

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Welcome!

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## **DISCLAIMER: THIS PRESENTATION IS NOT LEGAL ADVICE**

Please recognize that this presentation covers trends in the law generally and is for informational or educational purposes only. This presentation is not legal advice nor does it establish an attorney-client relationship with those watching. The law is complex and constantly changing, so the topics in this presentation likely will not relate to or address your specific legal issue. However, we would be happy to consult with you regarding your specific legal needs at another time. Feel free to contact us at:

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# Potential Presentation Interrupters...



Maggie



Ginny



Coco

# A rose by any other name...

Remote Work  
Telecommute or Telecommuting  
Telework or Teleworking  
Work From Home or Work-From-Home

**...it's the same thing.**

# Today's Agenda

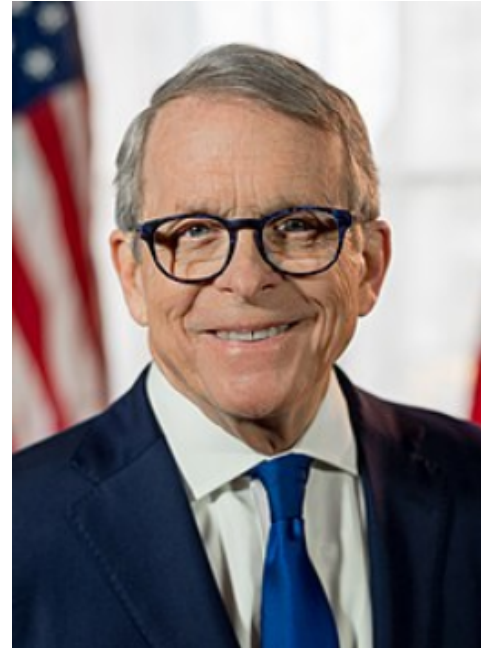
1. **Complying with Ohio's Recent Health Orders**
2. **Remote Work as the New Normal**
3. **Developing a Remote Work Policy**
4. **Potential Legal Pitfalls when Permitting or Forbidding Remote Work**
5. **Best Practices**



#1

# Complying with the Ohio's Recent Health Orders

- Executed by Director of the Ohio Dep't of Health, Dr. Amy Acton, appointed by Gov. DeWine, pursuant to R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases."
- On March 22, 2020, the **Stay At Home Order** was in effect. Originally set to expire on April 6, 2020, it was extended prior to its expiration until May 1, 2020.
- On April 30, 2020, the **Stay Safe Ohio Order** replaced the Stay At Home Order. It expired Friday, May 29, 2020.
- On May 29, 2020, the **Updated and Revised Order for Business Guidance and Social Distancing** took effect. It is set to expire on July 1, 2020.
- ...And more...



Governor Mike DeWine



Director of Health Dr. Amy Acton

<https://governor.ohio.gov/wps/portal/gov/governor/media>

# How does the “Stay At Home Order” address remote work?



- Was in effect for 39 days, from Saturday, March 22, 2020 until Thursday, April 30, 2020.
- All individuals ordered to “stay at home or at their place of residence.” Section 1, p. 1.
- Closes all “non-essential” businesses. However, there were many exceptions. Section 1, p. 2, Section 12, p.5.
- To be enforced by “state and local law enforcement.” Section 17, p. 8.
- Business’ “minimum basic operations” permitted to maintain value of business’ inventory, preserve condition of physical plant and equipment, ensure security, process payroll/benefits, and **“to facilitate employees of the business being able to continue to work remotely from their residences.”** Section 13, p. 7.
- Encourages businesses to **“allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.”** Section 18(a), p. 9.
- Encourages employers to ensure sick leave policies are up to date and flexible. Should include reference to persons with a fever staying home for at least 72 hours and seven days since symptoms first began. Section 18(b-c), p. 9.



# How does the “Stay Safe Ohio Order” address remote work?



- Effective from Thursday, April 30, 2020 until it expired on Saturday, May 29, 2020.
- Most businesses are permitted to reopen on various dates “so long as all workplace safety standards are met,” including 6 feet social distancing requirements and permitting persons to wear masks. Section 2, p.1.; Section 8, p. 2
- Violation is misdemeanor of second degree, a fine of \$750 or not more than 90 days in jail, or both. Section 19, p. 8.
- “**High risk**” persons identified as elderly people and persons with: (a) chronic lung disease or moderate to severe asthma, (b) serious heart conditions, (c) persons who are immune compromised, (d) persons with severe obesity (BMI 40 or higher), (e) people with diabetes, (f) with chronic kidney disease, or (g) with liver disease. Section 6, p.2.
- Indicates that business should “**strongly encourage as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.**” Section 20(a), p. 8.
- Encourages employers to ensure sick leave policies are up to date and flexible. Should include reference to persons with a fever staying home for at least 72 hours and seven days since symptoms first began. Section 20, p. 8.

## Reopening Dates (non-exhaustive):

- **April 30, 2020** - Non-essential surgeries and procedures. Section 9, p. 3.
- **May 4, 2020** – Manufacturing, distribution, and construction. Section 10, p. 4.
- **May 4, 2020** – General Office Environments. Section 11, p. 5.
- **May 12, 2020** – Retail. Section 12, p. 5.
- **May 22, 2020** – Separate Order allowed for opening of Baseball, Softball, Batting Cages, Golf Courses, Tennis Facilities, Bowling Alleys, Local and Public Pools. (Though this Order still separately indicated that it “**strongly encouraged**” as many employees as possible to work from home.) Section 2, p.1.; Section 8, p. 3.

# How does the “Updated and Revised Order for Business Guidance and Social Distancing” address remote work?

- Currently in effect. Began May 29, 2020 and will expire on July 1, 2020.
- Business and operations shall continue to comply with social distancing and masks. Section 3, p.1.; Section 7, p.2.
- “**High risk**” persons once again identified as elderly people and persons with: (a) chronic lung disease or moderate to severe asthma, (b) serious heart conditions, (c) persons who are immune compromised, (d) persons with severe obesity (BMI 40 or higher), (e) people with diabetes, (f) with chronic kidney disease, or (g) with liver disease. Section 5, p.5.
- Most business are allowed to be open. Business that are not allowed to be opened include: (a) schools, (b-c) adult day support and senior centers; and (d) entertainment/recreation (i.e. laser tag, carnivals, water parks, etc.) Section 4, ps. 4.
- Again, indicates that business should “**strongly encourage as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.**” Section 12(a), p. 5.
- Again encourages employers to ensure sick leave policies are up to date and flexible. Should include reference to persons with a fever staying home for at least 72 hours and seven days since symptoms first began. Section 12, p. 5-6.



# Responsible RestartOhio

## General Office Environments



### Mandatory

#### Employees & Guests

- Ensure minimum 6 feet between people, if not possible, install barriers
- Personnel should work from home when possible and feasible with business operations
- Limit travel as much as possible
- Stagger arrival of all employees and guests
- Businesses must require all employees to wear facial coverings, except for one of the following reasons:
  - Facial coverings in the work setting are prohibited by law or regulation
  - Facial coverings are in violation of documented industry standards
  - Facial coverings are not advisable for health reasons
  - Facial coverings are in violation of the business's documented safety policies
  - Facial coverings are not required when the employee works alone in an assigned work area
  - There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

*(Businesses must provide written justification to local health officials, upon request, explaining why an employee is not required to wear a facial covering in the workplace. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual's nose, mouth, and chin.)*

- Employees must perform daily symptom assessment\*
- Require employees to stay home if symptomatic
- Require regular handwashing by employees
- Place hand sanitizers in high-contact locations

### Recommended Best Practices

- Ensure seating distance of minimum 6 feet or more
- Consider having customers wear face covering at all times
- Enable natural workplace ventilation
- Health questionnaire for symptoms at entry
- Temperature taking protocol

[HTTPS://CORONAVIRUS.OHIO.GOV/](https://coronavirus.ohio.gov/)  
CONTAINS HELPFUL RESOURCES

But Be Careful!  
Check the date. (This is 05/26/20)  
Mandatory or Recommended?  
Check the Order.  
Consider the Context.  
Consult with Counsel.

## In the News: Several Major Companies Reportedly Considering Permanent Work from Home Policies for Certain Employees

- Facebook
- Nationwide
- Shopify
- Barclays
- Mondelez

**Would remote work options be useful for your business?**

**If so, what policies should you implement?**

**If not, what risks should you be aware of given that the Health Orders “strongly encourage” remote work options?**

#2

## Employees Working Remotely – The “New Normal”

- Remote work has risen at an exponential rate during the pandemic.
- For many employers and employees, this is a new way of working.
- Biggest concern – what are our legal risks?
- Biggest challenge – how do we keep our employees productive?
- Novel times bring novel solutions!

# #3

## Developing A Remote Work Policy

- Why have a Remote Work policy during this time?
  - Maintains connection, focus and productivity
  - Provides structure and stability to the arrangement
  - Protects against potential legal problems that could arise
- What provisions and safeguards should the policy include?
  - Remote work responsibilities and expectations
  - List of infrastructure (equipment) needed
  - Safety and security provisions
  - Legal disclaimers
- Who should receive the policy?
  - All employees working remotely



# Sample Work-From-Home Policy

1. **Eligibility:** determine what positions are eligible to work remotely.
2. **Availability:** outline times when employees will be available (their “office hours” and policies on overtime and PTO).
3. **Responsiveness:** define whether and when employees are expected to respond and the modes of communication that should be used.
4. **Measuring Productivity:** specify how an employee’s productivity and performance will be measured; what deliverables are expected.
5. **Equipment:** spell out what tools and equipment are needed to successfully perform remote work and who is responsible for the cost.
6. **Tech Support:** outline what employees are expected to do when having technical difficulties, so there is a plan of action.
7. **Physical Environment:** ensure employee’s work environment is safe and ergonomically friendly.
8. **Security:** put in place rules around electronic security and safeguarding of confidential/proprietary company information.



***\*Remember, when employees can telework, they will not qualify for the New Federal Paid Sick/Family Leave Laws (under the Families First Coronavirus Response Act).***

*\*Employers are not exempt from safety, wage and hour and other employment requirements of the regular workplace... how can employers protect themselves and make sure employees remain accountable and focused??*

#4

## Potential Legal Pitfalls When Permitting or Forbidding Remote Work



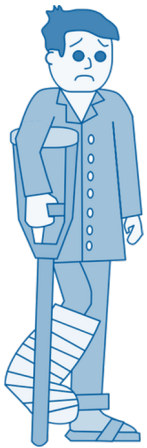
*What should employers be aware of?*

- Data Security Concerns (cybersecurity risks)
- FLSA Violations (wage and hour claims)
- The Families First Coronavirus Response Act (FFCRA)

And more...

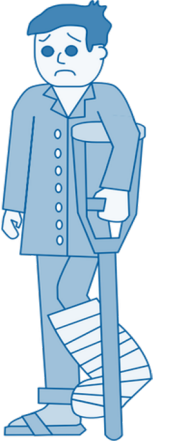
# The Risk of Workers' Compensation Claims – Part 1

- The phrase "in the course of employment" limits compensable injuries to those sustained by an employee while performing a required duty in the employer's service. Indus. Comm. v. Gintert (1934), 128 Ohio St. 129, 133-134, 190 N.E. 400, 403.
- "To be entitled to workmen's compensation, a workman need not necessarily be injured in the actual performance of work for his employer." Sebek v. Cleveland Graphite Bronze Co. (1947), 148 Ohio St. 693, 36 Ohio Op. 282, 76 N.E.2d 892, paragraph three of the syllabus.
- An injury is compensable if it is sustained by an employee while that employee engages in activity that is consistent with the contract for hire and logically related to the employer's business. Kohlmayer v. Keller (1970), 24 Ohio St. 2d 10, 12, 53 Ohio Op. 2d 6, 7, 263 N.E.2d 231, 233.



# The Risk of Workers' Compensation Claims – Part 2

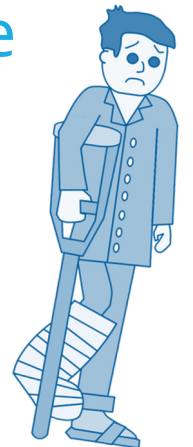
- An injury at home must be analyzed under this line of logic. What was the person doing at the time of the injury and why were they doing it?
  - Tripping while walking – depends.
    - Factual Analysis: tripping over your carpet while walking to the bathroom during your working hours – likely compensable. Knee giving out while walking to the bathroom - likely deemed idiopathic.
  - Falling down the stairs – depends.
    - Factual Analysis: Running down the stairs to catch a phone call - maybe. Simply walking down the stairs after lunch - probably not.
  - Attending to a child - non-compensable.



# The Risk of Workers' Compensation Claims – Part 3

## House Bill 606

1. Temporary liability protection for healthcare providers and emergency service providers from lawsuits over COVID-19 acquisition; and
2. Rebuttable presumption for workers' compensation coverage for certain classes of employees who contract COVID-19.



# The Risk of Workers' Compensation Claims – Part 4

## Previous examples of rebuttable presumption:

Cardiovascular, pulmonary, or respiratory diseases incurred by firefighters or police officers following exposure to heat, smoke, toxic gas, chemical fumes and or toxic substances in the performance of their duties constitute a presumption, which may be refuted by affirmative evidence, that such occurred in the course of an arising out of their employment.

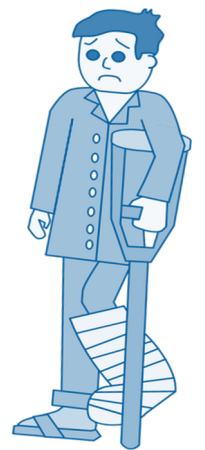
## The Risk of Workers' Compensation Claims – Part 5

COVID-19 contracted by an employee during the emergency declared by Executive Order 2020-01D, issued March 9, 2020, constitutes a presumption, which may be refuted by affirmative evidence, that COVID-19 was contracted in the course of and arising out of the employee's employment.



# The Risk of Workers' Compensation Claims – Part 6

- This rebuttable presumption applies to only certain classes of employees who contract COVID-19.
  - Retail food workers
  - Food processing workers
  - Firefighters
  - Police Officers
  - Emergency Medical Workers
  - Correction Officers



# The Risk of Lawsuits

- Anyone can sue anyone at any time for any reason - but employers should remain up-to-date on the evolving Health Orders to reduce the risk of lawsuits.
- If an employer does allow remote work, how do they ensure their policies are equally enforced and applied to prevent litigation risks?
- If an employer does not allow remote work, how do they respond to a reasonable accommodation request to work from home due to disability?

An important consideration is whether “high risk” persons identified by Ohio’s Health Orders (i.e. persons over 65 or with severe obesity or disease of the lung, heart, immune system, kidney, or liver) are “disabled” under the law?



- The Americans with Disabilities Act (“ADA”) prohibits discrimination “on the basis of disability” 42 U.S.C. § 12112(a)
- Defines “disability” as “a physical or mental impairment that substantially limits one or more major life activities” 42 U.S.C. § 12102.
- Equal Employment Opportunity Commission (EEOC) has published COVID-19 Guidance.

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>



- Ohio defines an “unlawful discriminatory practices” as when “because of...disability” an employer discriminate against an employee with regard to “hire, tenure, terms, conditions, or privileges of employment or any matter...related to employment.” R.C. 4112.02
- Borrows definitions and standards from federal law.
- Ohio Civil Rights Commission (OCRC)

## Reasonable Accommodation Requests to Work Remotely

- “Regular, in-person attendance constitutes an essential function of most jobs.” *Popeck v. Rawlings Co., LLC*, 791 F.App’x 535, 539 (6th Cir.2019).
- Deference to employer on what is “essential.” 42 U.S.C. § 12111(8).
- How do we balance this legal doctrine with Ohio’s recent Health Orders’ “**strong encouragement**” that as many employees work from home as possible?
- Employers should be cognizant of the impact remote work already had or may have on their employees and their concerns about returning.

## So what does an employer do if an employee wants to work remotely due to COVID-19?

- Considerations: “High risk” or just unwilling/scarred? What about exacerbated anxiety/depression?
- Employer can: (1) ask questions to determine whether the employee has a disability; (2) discuss with the employee how the requested accommodation would assist and enable the employee to keep working; (3) explore alternative accommodations that may effectively meet employee needs; and (4) when necessary, request medical documentation supportive of the accommodation.
- Ask for documentation that it is “medically necessary” that they work from home. *See Tchankpa v. Ascena Retail Group, Inc.*, 6th Cir. No. 19-3291, 2020 U.S. App. LEXIS 7060 (Mar. 6, 2020).
- The Employer should not: inquire into the nature of the disability unless job-related and consistent with business necessity. The employer normally cannot require a medical examination. However, pandemic litigation allows temperature checks and direct requests of whether an employee is experiencing COVID-19 symptoms. Also allows employer to send home person with symptoms.

# Check out our next Webinar!

**Tues. June 16, 2020 @ 2:00 pm**

*• Effectively Accommodating Disabilities as Employees*

*Return to Work, Ian Mitchell*



## Other Litigation Risks

- **Age Discrimination.** Elderly persons (defined as persons over 65) are in the “high risk” category regardless of health status. However, if an employer enacts a different standard for these persons, it may still be regarded as age discrimination.
- **Discrimination, generally.** Policies should be applied equally, to all employees in similar positions regardless of race, color, religion, sex, military status, national origin, disability, age, or ancestry, or any other protected category.
- **Retaliation, generally.** If an employee complains you are not complying with the law, termination for this complaint could be seen as retaliation.
- **“Public Policy”** argument.

#5

## Best Practice Considerations



*What are remote work best practices to consider?*

- Set VERY clear expectations – productivity metrics and objectives
- Make sure employees understand that they are still accountable
- Set cadence for communication and secure method of how team members will communicate (Zoom, Skype, Videoconferencing, etc.)
- Ensure employees have a safe space and support from the company to perform their essential job duties
- Make sure managers/supervisors are “checking in” on a regular basis and asking for feedback

Thank you!

Questions?

Contact us!

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# Common Questions

1. What support and infrastructure should I provide remote employees?
2. Is it common to provide a stipend for phone and internet? How much is reasonable?
3. Is it okay to have my remote workers track their work time? What is the best way of doing this?
4. How does working from home affect the psychological health of my employees?
5. How will everyone working remotely affect my culture?
6. What should I do if my remote worker goes MIA at times?
7. What are some best practices on how to conduct virtual meetings?

# REMINER

## Future Presentations

**Tues. June 16, 2020 @ 2:00 pm**

*Effectively Accommodating Disabilities as Employees  
Return to Work, Ian Mitchell*

**Tues. June 30, 2020 @ 2:00 pm**

*Paid Leave Obligations Under the Families First  
Coronavirus Response Act, Chad Willits*

**Additional Topics & Dates TBD**

RESULTS • PERIOD •