



Managing the COVID-Era Workplace: Part 1: The ADA, Wage and Hour Laws, and Other Considerations

Webinar presented by:
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1



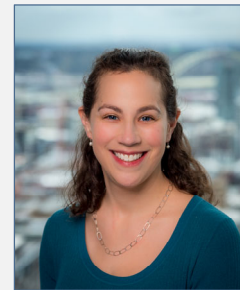
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2

2

Today's Agenda — Managing the COVID-Era Workplace

- State guidance and workplace rules regarding social distancing, hygiene, and masks
- Disability accommodations
- Wage and hour issues
- Avoiding liability and mitigating risk
- Questions

State Guidance and Workplace Rules Regarding Social Distancing, Hygiene, and Masks

State Guidance — Face Coverings

- **Washington:** Beginning June 8, all employees must wear face coverings unless they are working alone in an office, in a vehicle, or at a job site where there is no in-person interaction
- **Oregon:** Employers in certain businesses (incl. grocery stores, gyms, personal service providers, restaurants, and retail stores) must require employees to wear a face covering
- Other states, including select cities and counties in California, are also mandating face coverings for employees

5

5

State Guidance — Face Coverings

- Employers must make face coverings available for employee use, though employees may choose to use their own
- Exceptions for employees with a disability that makes wearing a face covering inappropriate
- Exceptions for employees who are hearing impaired and reliant on facial expressions for communication, or for those who are communicating with someone who is hearing impaired

6

6

State Guidance — Social Distancing & Hygiene

- **Washington:**
 - Employers must maintain 6 ft social distancing for all individuals to the extent possible.
 - https://www.lni.wa.gov/agency/docs/wacoronavi_rushazardconsiderationemployers.pdf
- **Oregon:**
 - Social distancing and hygiene guidelines for all employers:
<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/le2342C.pdf>
 - Sector-specific requirements:
<https://govstatus.egov.com/or-covid-19>

7

7

What Other Businesses Are Doing

- Requiring face coverings and/or gloves
- Modifying workspaces, layouts of work stations
- Plexiglass and dividers
- One-way hallways and aisles
- Schedule modifications, staggered shifts and breaks
- Pooling or adjusting tasks to limit the # of employees onsite
- Limiting or prohibiting in-person meetings
- Return-to-work training on hygiene and respiratory etiquette
- Increased cleaning and sanitation schedules
- Restricting use of communal lunchrooms and kitchen items

8

8

Best Practices When Implementing New Safety Rules

- Err on the side of overcommunicating to employees — what are you doing and why?
- Stay up-to-date and be prepared to educate employees — employees often look to their employers first for guidance and advice
- Have a plan for what you will be doing to keep employees safe
- Have a plan for what you will do if an employee gets sick

Disability Accommodations in the COVID-Era Workplace

Disability Accommodations — General Principles

- A disability-related request to modify a COVID-related policy should be treated like a request to modify a workplace safety rule
- Don't have to waive rules that are job-related and consistent with business necessity but need to engage in the interactive process and explore accommodations that will enable the employee to comply with the rule

11

11

Face Coverings

Dear Brenda, Laura, and Caroline,
We are requiring all employees to wear face coverings. One of our long-standing employees says that she's unable to wear a mask because she has asthma and a mask makes it difficult to breathe. What do we do?

12

12

Fear of Returning to Work

Dear Brenda, Laura, and Caroline,

We just reopened our business after several months of being closed. On her first day back, one of our employees claims that the COVID-19 pandemic has triggered her anxiety disorder and asks to go home for the rest of her shift. What do we do?

- Would the answer change if she was just too scared to come to work?
- Would the answer change if she just wanted to keep collecting unemployment?

13

13

Vulnerable Employees

Dear Brenda, Laura, and Caroline,

We have several employees with underlying health issues who fall in the CDC's "high risk" category. We are concerned about those employees returning to our workplace and would like to offer them the ability to work from home until it is safe for them to return to work. Is that okay?

- Is it okay to offer WFH to them but not anyone else?

14

14

Other ADA Considerations in the COVID-Era Workplace

- Be practical and flexible with regard to medical documentation requirements
- Not required to accommodate a direct threat.
Direct threat = significant risk of substantial harm to self or others
- Medical documentation, including results of temperature checks and COVID-symptom screenings, must be kept confidential

15

15

Wage & Hour Issues to Be on the Lookout for in the COVID-Era Workplace

16

Is This Compensable Work Time?

- Time spent training on appropriate hygiene and social distancing practices
- Time spent doing medical screenings and temperature checks
- Time spent putting on face coverings or other PPE
- Time spent filing out a mandatory social activity questionnaire before reporting to work
- Time an employee spends disinfecting the employee's own office at the end of the workday

17

17

Who Pays for These — the Employer or Employee?

- Work-from-home equipment and furniture
- Employee face coverings or masks
- The cost of laundering employee cloth face coverings

18

18



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Avoiding Liability and Mitigating Risk

19



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Liability Waivers for Employees

- Not advisable and unlikely to be enforced
- If employee contracted COVID-19 at work, would likely be handled as a workers' compensation claim
- Employees can't validly waive their right to receive workers' compensation benefits
- Waiver could be viewed as an attempt to avoid OSHA obligations or be used against the company in a workers' compensation retaliation claim

20

20

Avoiding Retaliation Claims

- BOLI has indicated that OSHA retaliation claims will be a focus
- Encourage reporting, and give employees multiple avenues through which to report COVID concerns
- Two-way dialogue: encourage questions and suggestions
- Be on the lookout for peer-to-peer retaliation

21

21

Action Items

- Review applicable state and local guidance regarding reopening and returning to work
- Have a plan for what you will be doing to comply with that guidance and keep employees safe
- Communicate with your employees — what are you doing and why?
- Don't forget everything you already know about FMLA, wage & hour, and the ADA
- Encourage employee suggestions and feedback
- Provide resources for employees to report safety concerns

22

22

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