Fox Rothschild LLP
ATTORNEYS AT LAW

Labor & Employment Issues Facing the Health Care Industry Today

Mark E. Tabakman
973.994.7554
mtabakman@foxrothschild.com

Health Care Legal Issues

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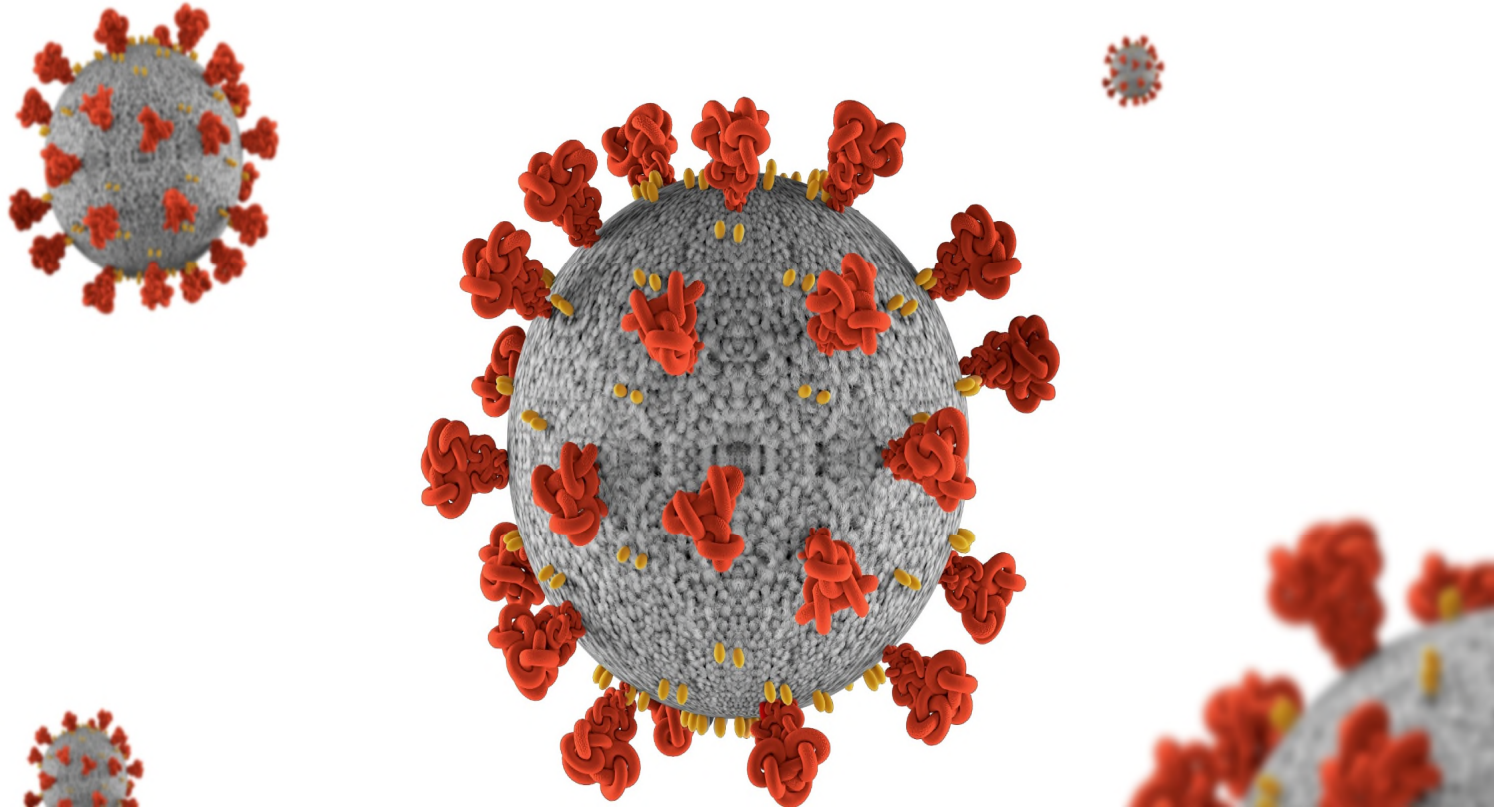
COVID-19



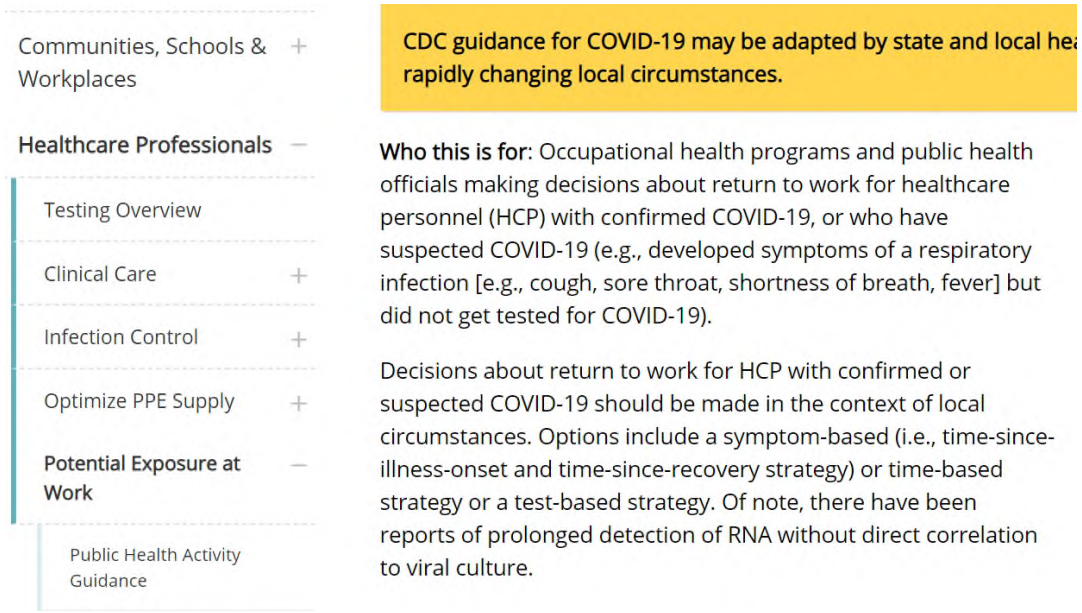
Agenda

- Abiding by OSHA/CDC guidelines for ensuring a safe workplace
- Updating existing policies and drafting new ones to address COVID-19 safety protocols
- Reviewing EEOC/ADA requirements
- Addressing employment terms and conditions and employee concerns (refusals to return, accommodations, FFCRA)
- Wage hour issues/concerns
- New potential for Union organizing

Reopening Your Practice: Topics

1. Resuming elective care
2. Patient screening
3. Employee screening
4. Safety precautions in the practice
5. Employee management issues
6. FFCRA
7. Unemployment compensation
8. CARES Act

CDC Operating Guidelines for Health Care Facilities



CDC Operating Guidelines for Health Care Facilities (Cont'd)

Return to Work Criteria for HCP with Suspected or Confirmed COVID-19

Symptomatic HCP with suspected or confirmed COVID-19 (Either strategy is acceptable depending on local circumstances):

- *Symptom-based strategy*. Exclude from work until:
  - At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and**,
  - At least 10 days have passed *since symptoms first appeared*
- *Test-based strategy*. Exclude from work until:
  - Resolution of fever without the use of fever-reducing medications **and**
  - Improvement in respiratory symptoms (e.g., cough, shortness of breath), **and**
  - Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens)[1]. See Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens for 2019 Novel Coronavirus (2019-nCoV). Of note, there have been reports of prolonged detection of RNA without direct correlation to viral culture.

CDC Operating Guidelines for Health Care Facilities (Cont'd)

HCP with laboratory-confirmed COVID-19 who have not had any symptoms (Either strategy is acceptable depending on local circumstances):

- *Time-based strategy.* Exclude from work until:
  - 10 days have passed since the date of their first positive COVID-19 diagnostic test assuming they have not subsequently developed symptoms since their positive test. If they develop symptoms, then the *symptom-based* or *test-based strategy* should be used. Note, because symptoms cannot be used to gauge where these individuals are in the course of their illness, it is possible that the duration of viral shedding could be longer or shorter than 10 days after their first positive test.
- *Test-based strategy.* Exclude from work until:
  - Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens). Note, because of the absence of symptoms, it is not possible to gauge where these individual are in the course of their illness. There have been reports of prolonged detection of RNA without direct correlation to viral culture.

Note that detecting viral RNA via PCR does not necessarily mean that infectious virus is present.

Consider consulting with local infectious disease experts when making return to work decisions for individuals who might remain infectious longer than 10 days (e.g., severely immunocompromised).

If HCP had COVID-19 ruled out and have an alternate diagnosis (e.g., tested positive for influenza), criteria for return to work should be based on that diagnosis.

CDC Operating Guidelines for Health Care Facilities (Cont'd)

Spanish Communication Resources

Social Media Toolkit

Infection Control

FAQ on Infection Control

Return to Work Practices and Work Restrictions

After returning to work, HCP should:

- Wear a facemask for source control at all times while in the healthcare facility until all symptoms are completely resolved or at baseline. A facemask instead of a cloth face covering should be used by these HCP for source control during this time period while in the facility. After this time period, these HCP should revert to their facility policy regarding universal source control during the pandemic.
  - A facemask for source control does not replace the need to wear an N95 or higher-level respirator (or other recommended PPE) when indicated, including when caring for patients with suspected or confirmed COVID-19.
  - Of note, N95 or other respirators with an exhaust valve might not provide source control.
- Self-monitor for symptoms, and seek re-evaluation from occupational health if respiratory symptoms recur or worsen

CDC Operating Guidelines for Health Care Facilities (Cont'd)

Strategies to Mitigate Healthcare Personnel Staffing Shortages

Maintaining appropriate staffing in healthcare facilities is essential to providing a safe work environment for HCP and safe patient care. As the COVID-19 pandemic progresses, staffing shortages will likely occur due to HCP exposures, illness, or need to care for family members at home. Healthcare facilities must be prepared for potential staffing shortages and have plans and processes in place to mitigate them, including considerations for permitting HCP to return to work without meeting all return to work criteria above. Refer to the *Strategies to Mitigate Healthcare Personnel Staffing Shortages* document for information. As part of this, asymptomatic HCP with a recognized COVID-19 exposure might be permitted to work in a crisis capacity strategy to address staffing shortages if they wear a facemask for source control for 14 days after the exposure. This time period is based on the current incubation period for COVID-19 which is 14 days.

CDC Guidelines for Nursing Homes

- Nursing homes have been severely impacted by COVID-19, with outbreaks causing high rates of infection, morbidity and mortality.
- The vulnerable nature of the nursing home population combined with the inherent risks of congregate living in a health care setting, requires aggressive efforts to limit COVID-19 exposure and to prevent the spread of COVID-19 within nursing homes.

CDC Guidelines for Nursing Homes (Cont'd)

In order to comply with the CDC Guidelines, the following practices should remain in place even as nursing homes resume normal activities.

1. Assign one or more individuals with training in infection control to provide on-site management of the IPC program.

- This should be a full-time role for at least one person in facilities that have more than 100 residents or that provide on-site ventilator or hemodialysis services.

CDC Guidelines for Nursing Homes (Cont'd)

2. Report COVID-19 cases, facility staffing, and supply information to the National Healthcare Safety Network (NHSN) Long-term Care Facility (LTCF) COVID-19 Module weekly.

- Nursing homes can report into the four pathways of the LTCF COVID-19 Module including:
  - Resident impact and facility capacity
  - Staff and personnel impact
  - Supplies and personal protective equipment
  - Ventilator capacity and supplies

CDC Guidelines for Nursing Homes (Cont'd)

3. Educate residents, health care personnel and visitors about COVID-19, current precautions being taken in the facility and actions they should take to protect themselves.

- Provide information about COVID-19
- Regularly review CDC's guidelines and ensure that staff and residents are updated when the guidance changes
- Educate and train health care providers
- Reinforce sick leave policies, and remind HCP not to report to work when ill

CDC Guidelines for Nursing Homes (Cont'd)

4. Implement source control measures.

- HCP should wear a facemask at all times while they are in the facility
- Residents should wear a cloth face covering or facemask (if tolerated) whenever they leave their room, including for procedures outside the facility.
- Visitors, if permitted into the facility, should wear a cloth face covering while in the facility.

CDC Guidelines for Nursing Homes (Cont'd)

5. Have a plan for visitor restrictions.

- Send letters to families reminding them not to visit when ill or if they have a known exposure to someone with COVID-19.
- Facilitate and encourage alternative methods for visitation (e.g., video conferencing) and communication with the resident.
- Post signs at the entrances to the facility advising visitors to check-in with the front desk to be assessed for symptoms prior to entry.
- Screen visitors for fever (T≥100.0˚F), symptoms consistent with COVID-19 or known exposure to someone with COVID-19. Restrict anyone with fever, symptoms or known exposure from entering the facility.

CDC Guidelines for Nursing Homes (Cont'd)

6. Create a plan for testing residents and health care personnel for SARS-CoV-2.

- Testing for SARS-CoV-2, the virus that causes COVID-19, in respiratory specimens can detect current infections among residents and HCP in nursing homes.

CDC Guidelines for Nursing Homes (Cont'd)

7. Evaluate and manage health care personnel.

- Implement sick leave policies that are non-punitive, flexible and consistent with public health policies that support HCP to stay home when ill.
- Create an inventory of all volunteers and personnel who provide care in the facility. Use that inventory to determine which personnel are non-essential and whose services can be delayed if such restrictions are necessary to prevent or control transmission.
- As part of routine practice, ask HCP to regularly monitor themselves for fever and symptoms consistent with COVID-19.
- Screen all HCP at the beginning of their shift for fever and symptoms of COVID-19.
- Develop (or review existing) plans to mitigate staffing shortages from illness or absenteeism.

CDC Guidelines for Nursing Homes (Cont'd)

8. Provide supplies necessary to adhere to recommended infection prevention and control practices.

- Hand hygiene supplies
- Respiratory hygiene and cough etiquette
- Personal Protective Equipment (PPE)

CDC Guidelines for Nursing Homes (Cont'd)

9. Identify space in the facility that could be dedicated to monitor and care for residents with COVID-19.

- Identify space in the facility that could be dedicated to care for residents with confirmed COVID-19.
- Identify HCP who will be assigned to work only on the COVID-19 care unit when it is in use.
- Have a plan for how residents in the facility who develop COVID-19 will be handled (e.g., transfer to single room, implement use of transmission-based precautions, prioritize for testing, transfer to COVID-19 unit if positive).
- Have a plan for how roommates, other residents and HCP who may have been exposed to an individual with COVID-19 will be handled (e.g., monitor closely, avoid placing unexposed residents into a shared space with them).

CDC Guidelines for Nursing Homes (Cont'd)

10. Create a plan for managing new admissions and readmissions whose COVID-19 status is unknown.

11. Evaluate and manage residents with symptoms of COVID-19.

- Ask residents to report if they feel feverish or have symptoms consistent with COVID-19.
- Actively monitor all residents upon admission and at least daily for fever (T≥100.0˚F) and symptoms consistent with COVID-19.
- The health department should be notified about residents or HCP with suspected or confirmed COVID-19, residents with severe respiratory infection resulting in hospitalization or death, or more than three residents or HCP with new-onset respiratory symptoms within 72 hours of each other.

Some Generally Applicable Safety Measures from CDC

- Social distancing
- Limit in-person meetings
- Minimize physical contact
- Limit gatherings in lunch and break rooms – close them?
- Stagger shift starts/ends and break times

Some Generally Applicable Safety Standards

- Intensify sanitation efforts (use EPA-registered disinfectants with labels that claim to be effective against SARS-CoV-2, the virus that causes COVID-19)
- Educate employees about best practices regarding hygiene
- Respond to any safety concerns raised by EEs (be proactive; communicate with employees early and often)
- Temperature scans for employees (either at work or before reporting to work), if appropriate

Employees Returning to Work

- **Option 1**: If **an employee will not be tested** to determine if they are still contagious, the employee can leave home and return to work after these three conditions have been met:
  - The employee has had no fever for at least 72 hours (that is, three full days of no fever without the use of medicine that reduces fevers)
    AND
  - Respiratory symptoms have improved (for example, cough or shortness of breath have improved)
    AND
  - At least 10 days have passed since their symptoms first appeared

- **Option 2**: If **the employee will be tested** to determine if the employee is still contagious, the employee can leave home after these three conditions have been met:
  - The employee no longer has a fever (without the use of medicine that reduces fevers)
    AND
  - Respiratory symptoms have improved (for example, cough or shortness of breath have improved)
    AND
  - They received two negative tests in a row, at least 24 hours apart. Their doctor should follow CDC guidelines.

Contact Tracing

- Employers have an obligation to notify employees that there has been a confirmed case of COVID-19.
- The name of the employee with the confirmed case must remain **confidential, per HIPPA, ADA.**
- Determine who may have been exposed or in close contact with the confirmed case.
- Employees who have been exposed or in close contact should be sent home to monitor for symptoms (different rules for critical infrastructure employees).
- The rest of the workplace may continue working, but should self-monitor and report symptoms if they develop.

Disinfect/Clean Common Areas and Items

- Determine which areas need to be cleaned, and how often — sometimes multiple times per day, depending on how frequently the item is used
- Common areas such as lunch rooms and break rooms should be cleaned at least daily
- Follow CDC guidance on cleaning procedures

Disinfect/Clean Common Areas and Items (Cont'd)

- Tables
- Doorknobs
- Light switches
- Countertops
- Handles
- Desks
- Phones
- Keyboards
- Toilets
- Faucets and sinks
- Gas pump handles
- Touch screens
- ATM machines
- **Time clocks**

Refusal to Work

- What if an employee refuses to work? Does OSHA apply?
  - An employer cannot discriminate against (discipline) an employee who: (a) refuses, in good faith, to expose himself or herself to a dangerous condition in the workplace; and (b) believes they have no reasonable alternative but to avoid the workplace (or assignment).
  - The condition causing the employee's fear must be one that a *reasonable person* in *similar circumstances* would conclude possess a real danger of death or serious injury.
  - Where possible, the employee has asked his employer for, but not obtained, a correction of the dangerous condition.

Refusal to Work (Cont'd)

- If employee refuses to work:
  - Can use PTO for time away from work
  - Can take unpaid leave of absence (or take protected leave if certain leave laws are applicable)
- Contact counsel before disciplining an employee for refusing to work (e.g., potential OSHA violation, NLRA, whistleblower claim, retaliation claim, discrimination claim, etc.)
- **Don't use catch-all of "at-will" employment to justify firings – this doctrine is, essentially, dead because of all the statutes and laws protecting employees against unlawful discharge.**

Refusal to Work (Cont'd)

- Afraid of COVID-19 with no further explanation
  - Assuming it is not a result of the condition of the workplace, employee is not entitled to leave under federal and state law and will not collect unemployment or other paid benefit because work is available.
  - Talk to this employee and try to be flexible/understanding.
  - Consider an unpaid "personal leave" if that is feasible.

Refusal to Work (Cont'd)

- Afraid because they live with a higher-risk individual
  - Potential FMLA or other state or local leave law
  - Potential FFCRA or state or local paid sick leave
  - No requirement to accommodate because it is not employee's disability

Refusal to Work (Cont'd)

- Afraid of COVID-19 because of underlying medical issue
  - FMLA may be available with medical certification
  - Possible FFCRA paid sick leave if advised to quarantine
  - ADA interactive process for *potential* accommodation

Refusal to Work (Cont'd)

- Afraid of COVID-19 because higher-risk age group
  - Encourage those in higher-risk groups to continue to work from home if possible BUT cannot mandate that they work from home – ADEA
  - Otherwise, employee is not entitled to any leave entitlement or paid benefit

Refusal to Work (Cont'd)

- Beware of ADA issues: Possible need for reasonable accommodation
- PPP issues-workers making more receiving UI benefits than working-employers need to protect themselves on PPP loan repayment-insert caveat into recall letter.
- Beware of NLRA issues: Protected, concerted activity
  - Strikes? Walkouts?
  - Discharge or permanent replacement—It is *not* just semantics

Unemployment Insurance

- General rule is that UI benefits are denied if work is available, but this is being tested now

- Unsafe workplace/OSHA: May justify refusal to accept work – what are the “prevailing conditions of work?”

- High-risk workers (e.g. over 65) *may* have better argument to collect if they refuse to report.

Update Employee Handbooks

Consider additional policies that may be necessary to communicate to your employees.

- COVID-19 specific policies:
  - Social distancing and PPE
  - Temperature checks
  - Testing, isolating, and contact tracing
  - Sanitation
  - Use and disinfection of high traffic areas
  - Business travel: Zoom eliminates need currently and, maybe, in the future

Update Employee Handbooks (Cont'd)

- Other related policies:
  - Attendance
  - Leaves of absence (FFCRA)
  - Tele-working
  - Confidential information (including HIPAA protected information)
  - Breaks (location, timing, etc.)
  - Visitors

Vacation/PTO Policies

- Creatures of company policy — virtually no state statute mandates vacation or PTO time

- Company can (and should) set conditions for usage of PTO time

Vacation/PTO Policies (Cont'd)

- Employers may choose to allow employees to use vacation or PTO time to supplement their weekly pay if their hours have been reduced.

- No obligation to do so, but query whether the better practice is to make employees "burn through" their vacation time in scenario of reduction of hours

Vacation/PTO Policies (Cont'd)

- Review your policy to see if and how it addresses what happens to accrued but unused PTO time upon separation. If not addressed, you must address it (e.g. add a provision or a sentence) in whatever manner you wish (e.g. payout if separated due to virus issues, no pay out at all under any circumstances, etc.).

COVID-19 and Intersection of Laws

COVID-19 and Intersection of Laws

- ADA - discrimination and accommodation issues
- Title VII, ADEA and state or local anti-discrimination laws
- FLSA
- FMLA and state or local leave laws, paid/unpaid
- FFCRA
- OSHA retaliation (or other state or local whistleblower protections)
- NLRA (protected, concerted activity)

FFCRA

- Which employers are required to provide paid sick and family leave?
  - Private employers with fewer than 500 employees (including not-for-profit employers) and governmental employers (regardless of the number of employees)
  - NOTE: This ***includes*** employers who are otherwise exempt from the FMLA that have fewer than 50 employees
- Are certain employees exempt?
  - The benefits do not apply to certain federal government employees. Employers also may exclude employees who are health care providers and emergency responders

Events That Trigger Paid Sick Leave

Unable to work or telework because employee:

1. Subject to a federal, state or local quarantine or isolation related to COVID-19
2. Advised by HCP to self-quarantine due to concerns related to COVID-19
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis
4. Caring for an individual who is subject to (1) or (2) above
5. Caring for his/her child because school or place of care is closed or child care provider is unable to provide care due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by Secretary of Health and Human Services

FFCRA Lawsuit

- A lawsuit was filed a few weeks ago in federal court alleging the improper denial of paid sick leave. *Spells v Physician and Tactical Healthcare Services*
    - First of many?
    - Why do it—Employee earned $15 per hour so total value of claim is $1200
    - Retaliation angle is the key here
    - Liquidated damages sought and, naturally, attorneys fees
    - Advice is to settle quickly

Determining Who To Recall First

- In union context, the CBA likely addresses this-seniority?
- In nonunion context, there are various considerations.
  1. Operational needs/ability to perform the work available, e.g. by department?
  2. Pre-existing criteria for determining order of recall, either in Employee Handbook or in notice of layoff or furlough
  3. Seniority – ***Objective criteria*** negates discrimination allegations: Best defense against discrimination charge is use of neutral criteria, but watch out for disparate impact allegations. *Use seniority as a tie-breaker*.
  4. Volunteers

Determining Who To Recall First

Illegal considerations

- Cannot make decisions based upon race, gender, age
  - Disparate impact considerations
  - Conducting disparate impact analysis?
- Disability?
  - Higher-risk employees?

Americans with Disabilities Act

- The ADA prohibits private employers with 15 or more employees, state and local governments and labor unions from discriminating against qualified individuals with disabilities in all terms and conditions of employment. The statute also requires employers to reasonably accommodate disabled employees who are otherwise qualified for their positions.
- State laws are similar and may be tougher

What is a Disability?

- A disability must be of certain duration and must substantially limit major life activities in order for an employee to receive protection under the ADA. Short term injuries with no permanent long-term impact are not disabilities (e.g. sprained ankle).

Americans with Disabilities Act (Con't)

Mental Disability

- An employer must be aware that an employee suffers from a mental disability before it is obligated to act (e.g. is employee sad or clinically depressed?)
- Not all mental impairments will substantially limit an employee's major life activities
- Certain mental disabilities render an employee unable to perform the essential functions of a job
- Vital to request and get documentation

Americans with Disabilities Act (Cont'd)

Alcoholism and Drug Use

- The employer must have knowledge of employee's alcoholism in order for the ADA to apply.
- An employer can terminate employees for violating a company no-alcohol policy as long as the company's rules are applied consistently, e.g. reporting to work under the influence.
- An alcoholic who presents a direct threat of danger to himself and/or others will not be protected by the ADA
- **A *single* leave of absence for treatment is usually a reasonable accommodation for an alcoholic employee.**
- Employees with continuing or recent drug use are not protected by the ADA
  - The ADA, however, protects former drug users who are presently drug-free and have been without drugs for a considerable period of time.
- Casual drug use not protected, even if employee belatedly claims a "disability" (e.g. smoking pot in the parking lot).

COVID-19/ADA

- Employees with pre-existing mental health conditions may have more difficulty dealing with the virus situation and may be entitled to an accommodation but the employer must go through the reasonable accommodation analysis and protocol with that employee.

Americans with Disabilities Act (Cont'd)

- Undue Hardship
  - An employer is not required to provide an accommodation if it will impose an "undue hardship" on the operation of its business. A determination of undue hardship should be based on several factors, including:
    - The nature and cost of the accommodation needed
    - The overall financial resources of the employer
    - The number of persons employed at the employer
    - The effect on expenses and resources of the employer
    - The impact of the accommodation on the operations of the employer

Americans with Disabilities Act (Cont'd)

What is a substantially limiting condition?

- An employee who experiences a mere decrease in his/her ability to perform a major life function, or who is unable to perform only certain minor tasks associated with a job, is not substantially limited within the meaning of the ADA.
- An employee who is precluded from performing only one job or only certain distinct tasks, rather than an entire class of jobs, is not substantially limited within the meaning of the ADA.

Americans with Disabilities Act (Cont'd)

- The mere fact that an individual suffers from a recognized ailment or disease does not necessarily mean that this individual is substantially limited in his/her ability to perform the major life function of work.
- Mitigating and corrective measures (such as medication and corrective eye wear) may be considered when determining whether an employee is disabled.

Americans with Disabilities Act (Cont'd)

- **What is a reasonable accommodation?**
- Determining what may be an accommodation is an interactive process
  - Employer must be made aware of the employee's disability before it is obligated to take any action—**engage in interactive process!**
  - Employer not obligated to adopt the reasonable accommodation suggested by the employee, but it is "preferred."
  - Also protects the employer and provides defense!
- Reasonable accommodation may include, but not limited to:
  - Removing non-essential functions
  - Purchasing equipment to help an employee perform his job
  - Transferring a disabled employee to a vacant position
  - Depending on the type of job at issue, permitting a disabled employee to work at home
- Reasonable accommodations do not include the following:
  - Restructuring a company's entire organizational scheme
  - Transferring a disabled employee to a department and a position so that he/she can avoid contact with other individuals where such action would adversely impact the work of other employees
  - Eliminating a disabled employee's essential job functions.

Direct Threat/ADA

- Factors to consider for “direct threat” analysis:
  - Duration of the risk
  - The nature and severity of the potential harm
  - The likelihood that the potential harm will occur
  - The imminence of the potential harm
- Even if “direct threat” standard is met, employee can only be excluded from workplace if no accommodation is available

EEOC and Permissible Inquiries

- EEOC enforces federal discrimination laws, including ADA
- Under ADA, medical examinations or inquiries of employees must be “job related and consistent with business necessity”
- BUT EEOC has guidance for pandemics that applies to COVID-19 that are detailed in its “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act” that relax the normal protocols and allows employers to navigate COVID-19

EEOC and Permissible Inquiries (Cont'd)

- Employers may ask employees if they are experiencing symptoms of COVID-19. Symptoms may include:
  - Fever
  - Chills
  - Cough
  - Shortness of breath
  - Sore throat
  - Muscle pain
  - Loss of taste or smell
- Employer can ask about any symptoms that are identified by CDC
- Employer must maintain confidentiality in compliance with ADA

EEOC and Permissible Inquiries (Cont'd)

- Taking body temperature would be a medical examination under the ADA,

  BUT employers may do so in response to COVID-19:
  - 100.4˚F is current CDC-recommended threshold
  - Set up procedures
  - Maintain confidentiality
  - Be aware that not all infected people have a temperature so continue other precautions
  - If documenting, be aware of privacy concerns and store separately/limit access
  - Likely will be considered compensable time (FLSA)
  - Apply uniformly unless there is a reasonable belief based on objective evidence that a particular person might have COVID-19

EEOC and Permissible Inquiries (Cont'd)

- Employers may require COVID-19 testing before returning to work BUT
  - Set up procedures
  - Maintain confidentiality
  - Tests may be hard to come by and therefore, difficult to wait for availability
  - Confirm with group health plan regarding expenses
  - If documenting, be aware of privacy concerns and store separately/limit access
  - Maintain all other precautions because someone who tests negative could become infected after testing
  - Likely compensable time (FLSA/state law; for example, in NJ, medical exam is compensable by statute)

EEOC and Permissible Inquiries (Cont'd)

- What if employee refuses any of these procedures?
- The ADA allows an employer to bar an employee from physical presence in the workplace who:
  - Refuses to answer questions about whether he/she has COVID-19 or symptoms associated with COVID-19
  - Whether he/she has been tested for COVID-19
  - If he/she refuses to have temperature taken or get tested
- Consider unpaid leave – likely not entitled to any paid benefit

EEOC and Permissible Inquiries (Cont'd)

- If employee is sick or exhibiting symptoms, send them home
- If employee tests positive:
  - Advise them of their rights under available leave (FMLA, FFCRA, disability insurance, other paid sick leave)
  - Do contact tracing – follow CDC guidelines regarding quarantine
- For employees who are/were sick, you must require a doctor's note for return
- **NO RETALIATION**

EEOC and Permissible Inquiries for Hiring/Onboarding

- Employers may screen applicants for COVID-19.
- Testing after conditional offers of employment have been extended.
- Employers may delay start dates.
- Employers may withdraw offers of employment to candidates who test positive because they cannot safely enter workplace.
- Employers **MAY NOT** withdraw offers of employment based purely on employee's status as higher-risk.

COVID-19/ADA

- Under recently issued EEOC guidance, employers may screen job applicants for the virus after a conditional job offer is made, as long as it does this for all employees in the same type of job.
- Employers may delay the start of a job if applicant tests positive and may also withdraw a job offer, as the potential employee may not safely enter the workplace.

COVID-19/ADA (Cont'd)

- Employers may not withdraw job offers or refuse to hire workers who are pregnant or 65+ because they are in a higher "risk" group.

COVID-19/ADA (Cont'd)

- If an employee calls in sick, the employer may inquire if they are showing or experiencing any virus symptoms.

COVID-19/ADA (Cont'd)

- Employers make take the temperatures of employees even though that is otherwise considered a medical examination, although not all people who contract the virus develop a fever.

COVID-19/ADA (Cont'd)

- Employers may send employees home who display virus symptoms, without running afoul of the ADA.
- In a return-to-work situation, employers may also insist on proper medical documentation showing that an employee is virus-free.
- The employer may also require testing to demonstrate that employees are virus-free. Test must be accurate and is not an indicator that employee will not subsequently contract the virus.

COVID-19/ADA (Cont'd)

- Reasonable accommodation for employees who can only perform their jobs at the workplace may include plexiglass barriers or making aisles one-way.
- If PPE required to be worn upon return, employers may have to accommodate requests for modified PPE (e.g. non-latex gloves, gowns designed for wheelchair-bound workers).

COVID-19/ADA (Cont'd)

- Employers may still assert "undue hardship" to not provide an accommodation which may be "easier" to do in the times of a pandemic, than in ordinary times.
- Still must be very careful when asserting this defense – putting all eggs in one basket

COVID-19/ADA (Cont'd)

- Some people have conditions that place them at a higher risk for "severe illness" if they contract the virus. The EEOC Guidance explicitly states that an employer may not bar such a person from employment solely because of this possibility.
- "Direct threat" analysis then becomes applicable.
- Very tough burden to meet!

ADA Accommodations

- For higher-risk employees, still required to accommodate where possible. Some considerations include:
  - Alternative or additional PPE
  - Moving workspace
  - Temporary restructuring of non-essential duties
  - Staggering attendance
  - Unpaid leaves of absence may be considered an accommodation if it does not create an undue hardship
- Mental illness as a disability (i.e., anxiety)
  - Still engage in interactive process
  - May request medical documentation

EEOC and Accommodations

- When employer is aware of employee's higher risk medical condition, but the employee DOES NOT request an accommodation:
  - ADA **does not** require employer to do anything
  - ADA **does** prohibit adverse action against this employee, even if you think you are helping
  - **EXCEPT** ADA **does** allow employer to take action if employee's disability poses a "direct threat" to his/her health that cannot be eliminated by reasonable accommodation. This is a high and difficult standard to meet.

Americans with Disabilities Act

- Extended leave time may be a reasonable accommodation.
  - An employer is not obligated to permit a disabled employee to take indefinite periods of leave time, e.g. wait until virus vaccine developed
  - An employer is not obligated to excuse a disabled employee's repeated and sporadic attendance problems
  - **After a FMLA leave expires, accommodation obligation (possibly) begins.**
- An employee who does not meet the eligibility requirements of the FMLA may still be entitled to leave under the ADA *if the reasonable accommodation analysis results in that conclusion*.

COVID-19

- Under the Emergency Family and Medical Leave Expansion Act (EFMLEA), part of the Families First Coronavirus Recovery Act (FFCRA) an individual may also take expanded FMLA for care of a child or whose school, place of care is closed due to the virus.
- Or, if the child care provider (e.g. nanny) is unavailable for a COVID-19 reason
- NOTE: If business closed prior to April 1 effective date of law, this does not apply

COVID-19

- The employer must only grant this leave if a “suitable person” is not available to care for the child.

COVID-19

- Must only be employed for ***30 days***, instead of the usual one year, to take leave under the EFMLEA
- Need not have worked 1,250 hours

COVID-19

- First two weeks of this leave is unpaid, but then, the next 10 weeks *is* paid, at 2/3 of the regular of their regular rate, multiplied by the number of hours the employee would have been scheduled to work that day, to a maximum of $200 per day
- A maximum of $10,000 for those 10 weeks
- Cannot use accrued PTO during those first two weeks but can use for the next 10 weeks, if they have.

COVID-19

- Leave may be taken intermittently, but employer agreement is necessary.
- Employers and employees urged to collaborate and cooperate on use of intermittent leave.

COVID-19

- Small business exception: If business is less than 50 employees, this expanded leave provision inapplicable ***if***:

1. Providing the leave would mean that expenses would exceed revenues and cause the small business not to be able to operate at a minimal capacity; or,
2. The employee is a key employee; or,
3. There are not sufficient employees to perform the work that the leave-requesting employee(s) would have performed.

Light Duty

- However, by offering light-duty work, the employer might be able to offset the amount of workers' compensation benefits that the injured employee is receiving.
- Need to cap light duty assignments. 90 days maximum?
- *Need a policy*: Employer must control parameters of light duty or the slope is very slippery!
- Permanent light-duty positions are not a reasonable accommodation.

ADA

- Points to consider for light duty
  - Overall goal of program
  - Identify the type of work that will be available
  - Temporary vs. permanent light-duty positions
  - Eligibility requirements – “Injured in Battle”
  - CBA seniority provisions
  - On-the-job versus off-the-job injuries dichotomy

ADA (Cont'd)

ADA-FMLA/Light Duty Cases

- In **Grant v. Revera Inc./Revera Health Sys.**, No. CIV.A. 12-5857 JBS, 2014 WL 7341198 (D.N.J. Dec. 23, 2014), an employee working as a physical therapist suffered from a shoulder sprain while at work, which limited her ability to lift objects and the use of her right arm. The employee took the position she could "hardly perform any tasks" and "declined, on her own volition, to perform any tasks that required the use of her right arm." Ultimately, the employee was terminated and she later sued her employer under the ADA. The court found that because her employer provided her with a schedule "that enabled her to work only with those lower-need patients," absent a doctor's note affirming her alleged total inability to use her arm, that her employer had provided a valid reasonable accommodation.
- In **Artis v. Palos Community Hosp.**, No. 02-C-8855, 2004 WL 2125414 (N.D. Ill. Sept. 22, 2004), a certified nursing assistant who took a temporary limited-duty assignment for several months while recovering from a wrist injury, and then was unable to secure a new nursing position once she was cleared by her doctor to return to nursing, failed to show she was fired in violation of the FMLA because she was given more than 12 weeks of job protection.

ADA (Cont'd)

ADA-FMLA/Light Duty Cases

- In **Daugherty v. Genesis Health Ventures Of Salisbury, Inc.**, 316 F. Supp. 2d 262 (D. Md. 2004), the court held that the employer's failure to provide light duty assignments to pregnant workers did not violate the Pregnancy Discrimination Act, where the employer had a longstanding policy of withholding light duty assignments for all employees who had work restrictions not resulting from on-the-job-injuries.
- In **Etheridge v. Fedchoice Federal Credit Union**, 789 F. Supp. 2d 27 (D.D.C. 2011), a former employee brought an action against her former employer, alleging discrimination and wrongful termination in violation of Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA). The court held that the employee's plantar fasciitis did not qualify as disability under ADA, although the employee's medical impairment was of central importance to her daily life activities of standing and walking. It was temporary in nature, in that it lasted eight months at most, and it did not severely impact her ability to stand or walk.

COVID-19/ADA

- Leave of absence may be an accommodation but an indefinite leave of absence, prompted by “fear” of contracting virus, is **not a reasonable accommodation.**
- “Old-style” FMLA leave may be available and then, after that leave expires, analysis of whether further unpaid leave is required as an accommodation.

Other EEOC Considerations

- Try to avoid asking about family members' conditions because of the Genetic Information Nondiscrimination Act
  - Instead ask generally if employee has been exposed to virus
- No national origin discrimination (e.g. the "Chinese virus")
  - Ensure you have a robust anti-discrimination policy and enforce it

Other Legal Risks

- Be aware of employee complaints/concerns
- Whistleblower laws generally require a reasonable belief of violation of the law or public policy
  - **New wave of whistleblower suits expected!**
- Document concerns and responses
- Be aware of being “set up” and be mindful of union “salts” or plants

FLSA

- Non-exempt people are usually paid hourly, although there is no legal compulsion to pay non-exempt workers by “the hour.”
- Only paid for hours worked (without regard to use of PTO time to supplement weekly income)
- Hours can be reduced without legal exposure or consequences

FLSA (Cont'd)

- Under the FLSA exemption regulations, exempt employees must receive a **salary,** which is a pre-determined lump-sum of money, every week. That salary is, as of January 1, 2020, now $684 per week. **NOTE**: State law may require higher salary (e.g. New York, California)

- If the minimum salary is not received, then the employee is, by definition, non-exempt.

- **NOTE**: If exempt employee does any work during a given week, they must receive entire salary.

FLSA (Cont'd)

- Under the FLSA, an employer can prospectively reduce the pay of exempt employees, providing it is the result of an economic slowdown and not to evade the salary basis requirement.
- Beware: Primary duty test still applies so if exempt workers are "expanding" their range of duties to perform non-exempt functions, they must still perform exempt work 51% of the time to remain exempt.

FLSA (Cont'd)

- USDOL Opinion Letters also suggest that exempt employees can be converted to hourly employees and then have their salaried/exempt status restored when the time is right.
- This usually applies to seasonal variations in business ebb-and-flow but would apply here as well, in all likelihood.

NJ Wage Payment Act

- Beware of lawsuits under state wage-payment laws. A lawsuit has already been filed, charging wholesale violations of the New Jersey Wage Payment Act for not paying employees during the crisis.

- Such laws are usually interpreted very narrowly (e.g. pro-employee) by the DOL and the courts

Telecommuting

- Many clients have employees working from home, i.e. telecommuting. For exempt workers, this is an “easier” situation, but when non-exempt employees work from home, there are several issues that arise and must be dealt with.

Telecommuting (Cont'd)

- Employers must accurately monitor and record the working hours of such employees, as these situations present the great potential for abuse, e.g. padding hours worked at home.

- Or putting in for eight hours, but only working three?
  - Documentation of work done for the day: Proof of productivity?

Telecommuting (Cont'd)

- Employers might want to have employees call in when they begin work, take lunch and end their shift or record their time electronically. They might want to have them record their time by hand and then submit that time on a daily basis.
- Whatever method is chosen, the employer must remind employees of the need to accurately record all working time and ensure that they record ***when they take lunch and breaks*** so the working hours are not needlessly inflated.

Telecommuting (Cont'd)

- It is also vital that supervisors not contact non-exempt employees after regular hours or encourage any work to be performed outside the normal shifts of the workers. That will be deemed compensable working time and if that extra work takes them above forty hours in that week, it is then overtime.

Telecommuting/E-mail

- Even reading/responding to an email (or emails) will be working time and, if more than a minute or two (e.g., *de minimis*), these minutes will add to the weekly total.

- If these minutes push the employee to more than 40 hours in a week, then OT owed.

- *De minimis* is an overused defense which often does not work.
  - Cases standing for the premise that even five minutes, per day, is not *de minimis*

Telecommuting/E-mail (Cont'd)

- Wherever there is an element of employer compulsion, even if it is implicit, the resulting minutes spent in performing the function will be considered "working time."

- Employees often feel pressure to respond to emails (or read an attachment) if their boss sends it to them, even if coupled with a caveat that "it can wait until tomorrow."

Telecommuting/OT

- The suggestion is to pay an employee, the first time, for engaging in unauthorized overtime, so as to avoid a complaint to a Department of Labor, but at the same time warning that employee that this is not authorized and future instances of unauthorized overtime may lead to discipline for any violations.

- Shows reasonableness by doing this **and builds a defense**

Threat of Union Organizing

- Non-union employers must be aware that the COVID-19 situation may be providing unions with a new organizing tool which they will seize upon.
- Workers are concerned about safety, job security and transparency on work-related matters
  - If workers perceive management is not listening or responsive, employees may turn to unions for "help."

Threat of Union Organizing (Cont'd)

- Unions are adept at utilizing social media and, now, Zoom messaging.
- They are also setting up websites on virus issues, where employees can fill out a form and have the Union contact them.
- If employers are not proactively addressing and responding to employee concerns, Unions will jump in and offer "answers" and "protection."

Threat of Union Organizing (Cont'd)

- ***Remember—non-union employees enjoy the same Section 7 rights under the National Labor Relations Act that unionized workers do (and maybe even more so).***
- Mutual aid and protection
- Concerted activity-employee "committees" and employees sending a representative to management to express worker concerns
- Be VERY careful about disciplining/firing workers in these scenarios
- **DON'T ALLOW YOURSELF TO BE SET UP!**

Threat of Union Organizing

- Ambush election rules: Quick secret ballot elections (e.g., maybe in 14 days), often depriving employers of the chance to mount a campaign
- Social distancing rules may deprive employers of their biggest weapon in fighting organizing, the “captive” meetings.
- Hurts because unions often make wild promises and spread disinformation that employers may not be able to fully and timely respond.

The Issue of Waivers

- Will Congress pass laws limiting employer (big/small) liability in return to work scenario – likely “no.”
- Can employers use waivers or “assumption of risk” agreements with returning employees?
- Courts disfavor such waivers, given the unequal bargaining power between employers and employees.
- Workers compensation laws provide remedies and bars to lawsuits (except for intentional acts or gross negligence).
- Trump Rally of June 20. 2020 – waiver good? Time will tell…

The Issue of Waivers (Cont'd)

- Some businesses have relied upon waivers for many years, for customers – gyms, skydiving centers, horseback riding schools, etc.
- Could such commonly used waivers be extended to include COVID-19? It is too early to tell!
  - Depends on the steps employer has taken to make the workplace as safe as possible (e.g. cleaning, disinfecting, social distance, etc.)

COVID-19 Lawsuits

- As of June 13, 2020, 2,645 virus-related lawsuits have been filed. Most relate to denials of insurance claims, prisoner and detainee petitions and civil rights cases, including challenges to stay-at-home orders.
  - 49 relate to conditions of employment, including exposure to the virus or a lack of PPE
  - ***77 relate to unlawful termination***

Fox Rothschild Resources

Fox Rothschild Coronavirus Resource Page:
https://www.foxrothschild.com/coronavirus-resources/

Licensed Practical Nurses (LPNs), Charge Nurses, Coordinators: Supervisors or Not?

Who is a supervisor under the National Labor Relations Act?

Primary indicia of supervisory status under 2(11)

- Status determined by individual's duties, not title or job classification
- Very fact sensitive!
- Any person having authority in the interest of the employer to hire, fire, transfer, suspend, lay off, recall promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action.
  - Regardless of frequency of performance

LPNs, Charge Nurses, Coordinators: Supervisors or Not? (Cont'd)

Secondary Indicia of Supervisory Status

- Used in borderline cases
- Secondary factors include whether the individual:
  - Is considered by his fellow workers and by himself to be a supervisor
  - Attends management meetings
  - Receives higher wage rate than his fellow workers
  - Has substantially different benefits from subordinate employees

Case Summaries

- **NLRB v. Lakepointe Senior Care & Rehab Ctr., LLC**, 680 Fed. Appx. 400 (6th Cir. 2017)
  - A person who recommends discipline – or recommends any other kind of action under § 152(11) - will be a supervisor only if her recommendations are "effective," which means that managers give weight to them. Supervisors must also use "independent judgment" when deciding whether to exercise their authority.
  - When a nurse fills out disciplinary forms in a system of progressive discipline, the nurse need not specify the level of discipline to be a supervisor for purposes of 29 U.S.C.S. §152(11).
  - Moreover, the National Labor Relations Board itself has recognized that a supervisor recommends discipline even when her superior instructs her as to the level of discipline and advises her on the wording of the discipline notice.

Case Summaries (Cont'd)

GGNSC Springfield LLC v. N.L.R.B., 721 F.3d 403 (6th Cir. 2013). The court held that Registered Nurses (RNs) employed by nursing home had the authority to discipline certified nursing assistants (CNAs), and thus were supervisors, even though the RNs could not impose immediate adverse employment consequences, where RNs exercised independent judgment in deciding whether to issue a written memorandum, provide verbal counseling, or do nothing in response to misconduct by CNAs, the decisions of the RNs were not subject to approval or consultation, and the written memoranda formed the basis for nursing home's progressive discipline policy.

Case Summaries (Cont'd)

Schnurmacher Nursing Home v. N.L.R.B., 214 F.3d 260, 263 (2d Cir. 2000). The 2nd Circuit court held that the Registered Nurses and LPNs acting as Charge Nurses ("CN") in a nursing home:

- Exercised power "responsibly to direct" Certified Nursing Assistants, exercised independent judgment in doing so, and thus were supervisors under the NLRA.
- Some tasks assigned to CNs include providing patient care, including the administration of medicine and medical treatment, bathing and dressing patients, etc. CNs prepare the daily assignment sheet, including any substitutions for absent CNAs, set forth breaks and room assignments and monitor overall patient care. CNs also direct CNAs and can be written up for failure to do so.
- The Court reasoned that all these tasks, in the aggregate, amount to having the "power to direct" and were supervisory in nature.

Case Summaries (Cont'd)

Lakeland Health Care Associates, LLC v. N.L.R.B., 696 F.3d 1332 (11th Cir. 2012). The court held that the record did not support the NLRB's determination that the LPNs employed by nursing and long term care facilities were not "supervisors." LPNs were able to discipline, suspend, and effectively recommend termination of the CNAs. This included a "coaching" program which was a two-step program where LPNs attempt to re-train or re-coach CNAs whose job performance may be lacking. Through this program, they had discretion to effectively suspend and/or terminate CNAs. LPN Charge Nurses also assigned and responsibly directed the work of the CNAs.

Case Summaries (Cont'd)

Frenchtown Acquisition Company, INC. v. NLRB., 683 F.3d 298 (6th Cir. 2012) held RNs acting as Charge Nurses were not supervisors when:

- Verbal warning issued by CN to an aide was an *ultra vires* act and did not support finding of supervisory status.
- General, conclusory testimony that in-service trainings provided by Charge Nurses led to discipline, and were first step in disciplinary process, was not sufficient to satisfy employer's burden of proving that Charge Nurses had supervisory responsibilities.
- Evidence simply showing that CNs could bring errors or misconduct to manager's attention, and that manager decided how to proceed, was not enough to find supervisory status.

“Joint Employer” Doctrine

FLSA: In January 2016 USDOL issued an Administrative Interpretation announcing new standards for determining joint employment under the FLSA. The major takeaway from this Interpretation is that the DOL has broadly construed when an employer qualifies as a joint employer and, thus, when the employer may be held liable for wage and hour violations committed by the other joint employer.

Example: Casey, a registered nurse, works at Springfield Nursing Home for 25 hours in one week and at Riverside Nursing Home for 25 hours during that same week. If Springfield and Riverside are joint employers, Casey’s hours for the week are added together, and the employers are jointly and severally liable for paying Casey for 40 hours at her regular rate and for 10 hours at the overtime rate. Casey should receive 10 hours of overtime compensation in total (not 10 hours from each employer).

Joint Employer Updates

- On January 12, 2020, the Department of Labor announced a final rule to update its regulations on interpreting “joint employer status” under the Fair Labor Standards Act (FLSA).

Joint Employer Updates (Cont'd)

- **The DOL made the following classifications for Joint Employers:**
- It specifies that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee
- Provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee
- Clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA
- Specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely
- Provides several examples applying the Department's guidance for determining FLSA joint employer status in a variety of different factual situations

Joint Employer Updates (Cont'd)

- The four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee, includes the following factors from **Bonnette v. California Health & Welfare Agency**:

1. Whether a business can hire or fire employees
2. Whether it controls their schedules or conditions of employment to a substantial degree
3. Whether it determines workers' pay rates and the methods by which they are paid
4. If it maintains workers' employment records

- No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances.

Joint Employer Cases

- **Snyder v. Bd. of Regents for the Agric. & Mech. Colls., ex. rel. Okla. Stat Univ. Ctr. for Health Scis.,** No. CIV-16-384-F, 2020 U.S. Dist. LEXIS 28127 (W.D. Okla. Feb. 19, 2020)
- In this case the court held that under the joint employer test, two entities are considered joint employers if they "share or co-determine those matters governing the essential terms and conditions of employment."
- "Both entities are employers if they both 'exercise significant control over the same employees.'" The right to terminate is considered the most significant factor in determining whether significant control exists.
- Other factors to consider include the ability to: (1) promulgate work rules and assignments; (2) set conditions of employment, including compensation, benefits and hours; (3) supervise and discipline employees on a day-to-day basis; and (4) control employee records including payroll, insurance and taxes.

Joint Employer Doctrine

NLRA: The NLRB issued a decision in Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015), overruling longstanding precedent to expand its interpretation of the circumstances in which businesses qualify as joint employers.

- Specifically, the Board considered “indirect control” to be the primary factor in determining whether a joint employer relationship existed under the NLRA.
- In December 2018, the Court remanded the NLRB's determination of NLRA joint employer status was warranted because the Board did not confine its consideration of indirect control consistently with common-law limitations as the Board failed to confine it's inquiry to indirect control over the essential terms and conditions of the workers' employment.

Personal Liability for Health Care Supervisors/Managers

Identifying the statues that may allow for individual liability

1. **Individual Managers/Supervisors May Not Be Individually Liable Under Title VII, the ADA, or the ADEA**
   - Supervisors (agents of the employer) do not have individual liability under Title VII, the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA) as they are not within the meaning of "employer."
   - Courts routinely use the case law under all three statutes interchangeably.
   - The definition of employer under Title VII, the ADA and the ADEA are sufficiently similar to indicate Congress did not intend to allow for personal liability under these statutes.

Personal Liability for Health Care Supervisors/Managers (Cont'd)

Identifying the statutes that may allow for individual liability

2. Individual Liability May Be Imposed Under the FLSA, FMLA and Various Other Federal Statutes

- The Fair Labor Standards Act (FLSA), the Equal Pay Act, the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Employee Retirement Income Security Act (ERISA), the Occupational Health and Safety Act (OSHA), the Conscientious Employee Protection Act (CEPA) and the Family and Medical Leave Act (FMLA)
- Focusing again on the term "employer" as defined under the FMLA, FLSA, and CEPA, individual supervisors may be individually liable for violations
  - Employer is defined as, "any person [or group of persons] who act(s), directly or indirectly, in the interest of an employer to any of the employees of such employer."

Personal Liability for Health Care Supervisors/Managers (Cont'd)

- In Haybarger v. Lawrence County Adult Probation & Parole, 667 F.3d 408 (3d Cir. 2012), a "former state employee brought action against parole division for which she worked, county, and her supervisor, alleging violations of Family and Medical Leave Act (FMLA)." The court, as a matter of first impression, determined that the FMLA permits claims against supervisors in their individual capacity.
- In Hayduk v. City of Johnstown, 580 F.Supp.2d 429 (W.D. Pa. 2008), a former city employee sued the City and the City Manager, individually, asserting claims for alleged violations of the FMLA. While the court ultimately found the employee's ankle injury was not a serious health condition under the FMLA, the court did find the City Manager could be sued in his individual capacity under the FMLA.

Personal Liability for Health Care Supervisors/Managers (Cont'd)

- DOL regulations provide that a supervisor can be individually liable for violations of the Family and Medical Leave Act
- Test for liability is whether the individual defendant had the ability to control, in whole or in part, the actions resulting in a statutory violation. Aguas v State, 220 N.J. 494 (2015).
  - In determining an individual's level of control, courts will often invoke the "economic reality" test
  - The economic reality factors area as follows: (1) the individual's power to hire and fire employees; (2) whether the individual supervised and controlled employee work schedules or conditions of employment; (3) if the individual determined the rate and method of payment of the employee; (4) if the individual maintained employment records; and (5) if the individual had personal responsibility for making decisions that contributed to the alleged violation

Personal Liability for Health Care Supervisors/Managers (Cont'd)

The following general standards also implicate individual liability

- If the supervisor has responsibility for compliance
- If the supervisor has some degree of control over the employee
- If the supervisor has the responsibility to address the employee with regard to issues arising under the FMLA/FLSA/CEPA
- If the supervisor is the person charged with making the decision to take adverse action against the employee

Personal Liability for Health Care Supervisors/Managers (Cont'd)

Aiding or Abetting in Discrimination or Otherwise Providing Substantial Assistance May Impose Individual Liability Under Anti-Discrimination Laws.

- Supervisors/managers can be individually liable for 'aiding and abetting' discriminatory conduct of the employer.
  - To aid and abet in the discrimination the individual supervisor/manager must "willfully and knowingly associate himself/herself with the unlawful act, and seek to help make the act succeed."

Personal Liability for Health Care Supervisors/Managers (Cont'd)

- Failure to act may also give rise to liability, if such failure rises to the level of substantial assistance or encouragement. Failla v. City of Passaic, 146 F.3d 149, 158 (3d Cir. 1998).
- "Substantial assistance" will depend on the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the harasser, his state of mind, and the duration of the assistance provided. Marino v. Westfield Board of Education, 2016 WL 2901706 (D.N.J. May 18, 2016).

Personal Liability for Health Care Supervisors/Managers (Cont'd)

Supervisors/managers may also be liable by virtue of a hostile work environment sexual harassment claim.

- An employer is generally liable for a hostile work environment created by a supervisor because of the power that an employer delegates to a supervisor to control the day-to-day working environment facilitates the harassing conduct. Cowher v. Carson & Roberts, 425 N.J. Super. 285 (App. Div. 2012).

Personal Liability for Health Care Supervisors/Managers (Cont'd)

- Where an employer delegates authority to a supervisor to control the situation of which the plaintiff complained and the supervisor's exercise of that authority results in a violation of law and the delegated authority aided the supervisor in injuring the plaintiff, both the employer and supervisor can be held individually liable.

Mark E. Tabakman

973.994.7554
mtabakman@foxrothschild.com

Check out my Wage & Hour blog at:
http://wagehourlaw.foxrothschild.com