

Welcome to the SIG University Virtual Webinar Series
**Returning to Work: Manager Education
During a Period of Crisis and Unrest**

Douglas Desmarais, Esq. | *Smith & Downey*

June 16, 2020



During the webinar if you have any questions please feel free to...

- Text Richard: **(443) 250-8606**
- Email Richard: **richard@silbs.com**
- Zoom Chat: Enter questions via the "**Chat**" feature in the Zoom meeting

QUESTIONS?

REMINDERS

Slides & Resources will be emailed after the Webinar & are available on silbs.com/sig-university

Your feedback is important to us.

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All completed surveys will be entered in a raffle to win a \$100 donation to the charity of your choice!

Congratulations to last week's winners, Jess Loving from South Moon Under and Meg Timmons from Hood College. We are proud to support the NAACP Legal Defense & Education Fund and World Central Kitchen on your behalf!





UPCOMING
WEBINARS

JUNE 24TH, 12 PM – 1 PM EST

How to Solve the Biggest HR Tech Problems

Presenter: Josh Hoover, *Benefit Technology Resources*

JUNE 25TH, 1 PM – 2 PM EST

Resetting Workplace Expectations

Presenter(s):

Dr. Mark Cochran, Executive Director, *Johns Hopkins HealthCare Solutions*

Sarah Kachur, Executive Director of Population Health Analytics, *Johns Hopkins Healthcare Solutions*

Stuart Sutley, Head of Sales & Business Development, *Johns Hopkins Healthcare Solutions*

COVID-19 UPDATES

Visit our Coronavirus Resource Center for legal updates, webinars, whitepapers and more!

****Newly Added Resource****

An Employer's Playbook for Working During COVID-19 & Beyond

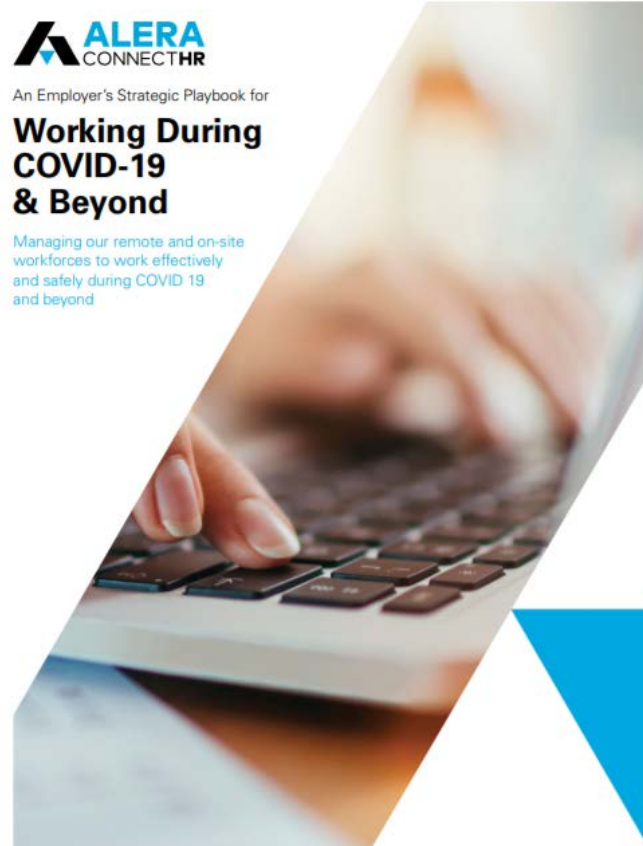
<https://aleragroup.com/coronavirus/>



An Employer's Strategic Playbook for

Working During COVID-19 & Beyond

Managing our remote and on-site workforces to work effectively and safely during COVID 19 and beyond



Restarting and Rethinking Your Workforce





CULTURAL
SENSITIVITY
RESOURCES

AleraHR's Cultural Sensitivity Resources & Tools

- [Best Practices – Harassment Prevention Strategy](#)
- [Diversity in the Workplace](#)

Learn courses on Diversity included in the 2020 AleraHR Learn Course Catalog:

- A Manager's Guide to Diversity, Inclusion, and Accommodation
- Diversity on the Job: The Importance of Diversity and the Changing Workplace
- Workplace Harassment Prevention for Employees – version 2.0 (Title VII)
- Global Diversity

ALERAHR

SUGGESTED RESOURCES FROM THE SIG TEAM

- [Johns Hopkins' Racial, Political and Economic Injustice, Activism, Police Brutality, Mass Incarceration and Criminal Justice Reform Resource Guide](#)
- [Make These 21 Books Part Of Your Anti-Racism Education](#)
- [#DoTheWork and Become Better Allies](#)
- [U.S. Businesses Must Take Meaningful Action Against Racism](#)
- [Uncomfortable Conversations With A Black Man](#)
- [Anti-racism Resources](#)
- [75 Things White People Can Do for Racial Justice](#)
- Optum has decided to offer support to the entire community by opening their Public Help Line to ANYONE who needs support during this time of crisis and civil unrest free of charge.
 - Call (866) 342-6892
 - Or visit Optum's [website](#)
 - Click Browse as a guest with a company access code
 - Click Forgot Your Access Code
 - Select the 2nd drop down option: **I am a member of UnitedHealthcare**



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Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.

Discrimination Law in the Workplace

Federal Laws

- **1964 – The Civil Rights Act of 1964**
 - Ended segregation in public places
 - Title VII – Bans employment discrimination on basis of race, color, religion, sex, and national origin
- **1967 – Age Discrimination in Employment Act**
- **1978 – Pregnancy Discrimination Act**
- **1990 – Americans with Disabilities Act**
- **2008 - Genetic Information Nondisclosure Act**

Maryland Law

- **Maryland Fair Employment Practices Act**
 - In addition to those protected by federal law, protected classes include ***marital status, sexual orientation, and gender identity***
- **Maryland Pregnancy Accommodation Act**
 - Employers must provide certain accommodations for pregnant employees

Employee Rights and Employee Responsibilities

- **Employee Rights:**

- An employer must not discriminate against an employee on the basis of any protected class
- Similarly protected from discrimination by vendors, clients, etc.

- **Employee Responsibility:**

- Employees must not discriminate against anyone else in the workplace on the basis of any protected class

What is Harassment?

- Subset of discrimination
- Unwelcome conduct that is based on any protected class
- Unlawful where: (1) enduring the offensive conduct becomes a condition of continued employment; or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

Harassment may include...

- Offensive jokes
- Stereotypes
- Slurs
- Name calling
- Physical assaults
- Threats
- Intimidation
- Ridicule
- Mockery
- Insults
- Put-downs
- Offensive objects/pictures
- Interference with work performance.

Race Harassment

The “Black Lives Matter” movement raises important questions regarding workplace conduct.

- May employees discuss in the workplace their belief that “Black Lives Matter”?
- May employees say in the workplace that they believe that “All Lives Matter”?
- May employees discuss “White Privilege” in the workplace?
- May employees discuss the impact of race upon recent police shootings?
- May employees state that they believe that race was a factor in the death of George Floyd?
- May employees disagree that race was a factor in the death of George Floyd?
- May an employer provide racial sensitivity training that focuses exclusively on the rights of African Americans in the workplace?

Retaliation

- Harassment includes unlawful retaliation for engaging in protected activity (e.g., communicating with a supervisor about employment discrimination, filing a complaint, testifying in an action)

What is Sexual Harassment?

- **Quid Pro Quo - Direct:**
 - Conditions employment on the return of sexual favors
- **Quid Pro Quo - Indirect**
 - Submission to or rejection of sexual advances, etc. is used as the basis for personnel decisions

What is Sexual Harassment? (Cont.)

- **Hostile Work Environment:**

- Conduct that has the purpose or effect of unreasonably interfering with individuals work performance or creating an intimidating, hostile, or offensive environment

- **Examples:**

- Sexual flirtations, touching, advances, proposition
- Verbal abuse of a sexual nature
- Graphic or suggestive comments about dress or body
- Sexually degrading words
- Display in workplace of sexually suggestive/offensive pictures or objects

Conduct Outside the Workplace

- Policies regarding anti-harassment, anti-discrimination, etc. apply to conduct outside the workplace, including:
 - Business Trips
 - Office parties
 - Social Media use

The Americans with Disabilities Act

- **Application:** Employers with 15+ employees
- **Requirements:** Employers are required to provide “reasonable accommodations” to employees with qualifying disability
- **Eligibility:** Employees are protected by ADA if they have: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record (or past history) of such impairment; or (3) are regarded by employer as having a disability.

The Americans with Disabilities Act – Key Principles

- Who is Covered?
 - Current Disability
 - History of a Disability
 - Perceived as Having a Disability
- Interactive Dialogue
- Reasonable Accommodation
- Undue Hardship
- Privacy of Employee Medical Information
- Storage of Health-Related Medical Information

Maryland Healthy Working Families Act

- The MHWFA requires Maryland employers to provide paid sick and safe leave to employees (unpaid leave if employing less than 15 employees)
- Employees must earn at least 1 hour of leave for every 30 hours they work
- Leave may be used for a variety of health-related reasons, even for health events of family members

Amount of MHWFA Leave

- Employees must receive 1 hour of leave for every 30 hours they have worked
- Employees can earn up to 40 hours of leave per year
- Up to 40 hours of unused leave must *carryover* to the next year, *unless* the employer makes available the employee's full annual allotment of leave at the beginning of the year
- Employer may award leave as it accrues, or they can award the full amount an employee would earn at the beginning of the calendar year
- Employers can limit the amount of leave earned at any given time to 64 hours (once employee hits this mark, they stop earning leave until they use some of it)

MHWFA Leave Usage

- Employees must be able to use leave for the following reasons:
 - To care for their own mental or physical illness, injury, or condition
 - To care for a family member's mental or physical illness, injury, or condition
 - Obtaining preventive medical care for themselves or their family member
 - Maternity or paternity leave
 - An absence caused by domestic violence, sexual assault, or stalking committed against either the employee or their family member, and the leave is being used:
 - To obtain medical or mental health attention,
 - To obtain services from a victim services organization,
 - For legal services or proceedings, or
 - Because the employee has temporarily relocated as a result of the incident

MHWFA Requirements for Employees

- Employees must provide up to 7 days notice for a use of leave that is *foreseeable*
 - If unforeseeable, must provide notice as soon as practicable
 - Employer may deny leave use if the employee fails to provide required notice *and* the absence will cause a “disruption”
- Employer can request verification of the use of leave if an employee uses leave for more than 2 consecutive shifts
 - Verification may also be required if the employee uses leave between the 107th and 120th calendar days of being employed (if it is a term agreed to at time of hire)
 - If employee fails to provide verification, subsequent requests to take leave for the same reason may be denied
- An employee *cannot* be required to find a replacement

Sick Leave and ADA, Cont.

- ADA may require employer to provide additional leave even after all available sick leave has been used
- Employer must engage in “interactive dialogue” to determine if there are any reasonable accommodations that would allow employee to perform essential functions of the job without causing undue hardship
- **Is attendance an “essential function”?**

The Family and Medical Leave Act

- **Application:** Covers all private employers that employed 50+ employees for at least 20 workweeks in current or preceding calendar year
- **Requirements:** Employer must grant up to 12 weeks of unpaid leave to employees in a 12-month period, for the employees to use for a variety of reasons including their own or family member's serious health condition
- **Eligibility:**
 - Work for a covered employer
 - Have worked for the employer for 12 months (need not be consecutive)
 - Have worked 1,250 hours in 12 months prior to the start of leave
 - Work at a location where the employer has 50 + employees in a 75-mile radius

Families First Coronavirus Response Act

- Overview:
 - Paid sick leave for COVID-19 reasons
 - Expansion of Family and Medical Leave Act (FMLA)
 - Which includes certain COVID-19 reasons and a new paid leave component
 - Two “Divisions” related to employment law:
 - Division C – Emergency Family and Medical Leave Expansion Act
 - Division E – Emergency Paid Sick Leave Act
 - Applies to employers with fewer than 500 employees

Division C – FMLA Expansion

- Employees are eligible if they've been on payroll for 30 calendar days immediately prior to the day leave would begin
- Allows for up to 12 weeks of leave
- Provides for an additional use for FMLA leave:
 - Where the employee is unable to work or telework due to the need for leave to care for his/her minor child (younger than 18 years old) because the child's school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency
 - *Use is also included in the Emergency PST*

Division E – Emergency Paid Sick Leave (“EPSL”)

- Provides ten days of *paid* leave
 - 80 hours for full-time employees
 - Pro-rata amount for part-time employees based on two-week average
 - May be used for six COVID-19-related reasons
 - Amount paid is subject to caps, which are subject to the reason the leave is being used

EPSL Reasons

- Under the Emergency PST, there are six uses for sick leave:
 1. The employee is subject to a Federal, State, or local quarantine;
 2. A health care provider has advised the employee to self-quarantine;
 3. The employee has symptoms and is seeking diagnosis;
 4. The employee is caring for an individual under quarantine;
 5. The employee is caring for a child whose school or place of care is closed or a child care provider is unavailable due to COVID-19; or
 6. The employee is experiencing any other substantially-similar condition.

COVID-19 REOPENINGS: OSHA

- The General Duty Clause under the OSH Act applies to virtually every workplace.
 - The Clause requires employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to...employees.”
 - The Clause also requires employers to comply with all occupational safety and health standards.
- Employers should be aware of CDC Guidance and, even though not mandatory, this Guidance should be treated as a requirement.

Question #1 – Reopening Guidance

What steps should an employer take to ensure a safe reopening environment?

Answer #1a – Reopening Guidance

- Before reopening, employers should:
 - Consider all local guidance and requirements to ensure compliance;
 - Identify areas at most risk of contamination (common areas, elevators, restrooms, etc.);
 - Create a plan that will reduce the risk of contamination and promote safety;
 - **Communicate all new requirements with employees**, including:
 - When reopening will occur;
 - What social distancing guidelines will be implemented;
 - Whether there will be physical changes to the office (such as rearranged workplaces); and
 - Whether work schedules will be altered, and to what degree;
 - Ensure that ventilation systems are fully operational (such as HVAC systems) – this is critical; and
 - Consider whether to conduct employee training focusing on the risks of being back in the workplace.

Answer #1b – Reopening Guidance (cont.)

- Rearranging workspaces and schedules – the CDC recommends:
 - Spacing seats and workstations further apart;
 - Installing shields/other barriers if rearranging is not feasible;
 - Posting signs, visual cues (such as tape on the floor) and other notices reminding employees of social distancing guidelines;
 - Placing employees in better-ventilated workplaces; and
 - Staggering work schedules (one employee group works mornings; the other group works nights).

Answer #1c – Reopening Guidance (cont.)

- The CDC recommends to increase air quality by:
 - Increasing the frequency of air supply (use the “fan” feature on the HVAC unit);
 - Opening windows;
 - Using fans to redirect airflow between offices and air filtration systems;
 - Operating exhaust fans in restrooms at full capacity; and
 - Using ultraviolet germicidal irradiation to kill the virus.

Answer #1d – Reopening Guidance (cont.)

- Promote healthy conduct in the workplace:
 - Consider testing employees daily;
 - Take proper sanitary steps, and encourage employees to do the same;
 - Limit occupancy in the office as a whole, as well as in common areas;
 - Require employees to wear masks when in the workplace and moving around;
 - Encourage employees to continue wearing masks while at their workstation;
 - Prohibit any and all handshaking, hugs, etc.;
 - Prohibit sharing materials/supplies unless necessary and sanitary steps have been taken;
 - Remind employees to properly wash their hands frequently;
 - Encourage employees to eat/meet outside;
 - Incentivize employees to discontinue public transportation; and
 - Remind all employees that if they are symptomatic or feeling ill, they should remain home and self-isolate until a healthcare provider deems them safe to return to work.

Question #2 – Testing Employees

Is an employer able to test employees for high temperatures/symptoms?

Answer #2 – Testing Employees

- Employers are permitted to conduct temperature/symptom checks of employees.
- If an employer decides to test employees, it should ensure safety measures are taken to prevent the possible spread of the virus, including:
 - Maintaining a distance of 6 feet among employees being tested;
 - Installing barriers to protect the screener's face from the employee being tested; and
 - Ensuring proper personal protective equipment is used at all times.
- Methods of testing:
 - Employers can ask employees to conduct their own temperature checks upon arrival (employers can give employees their own thermometer to lessen contact with others);
 - Perform employer-administered temperature checks (which should include using a new set of disposable gloves for each employee being screened);
 - Conduct a visual inspection of the employee for symptoms in addition to temperature checks (including looking for flushed cheeks or fatigue);

Question #3 – Testing Positive

What must an employer do if an employee tests positive, or reports that he/she has tested positive for COVID-19?

Answer #3a – Testing Positive

- If an employee tests positive at work, immediately separate him/her from all other employees, provide a face mask if the employee does not already have one, and then send the employee home.
- Request positive employees to identify all recent contacts in the workplace, and which common areas they used while at work (*see next slide*).
- Alert the office staff that an employee has recently tested positive for COVID-19.
 - Do not disclose any identifying characteristics of the positive employee – not even the employee’s gender.
 - However, an employer should disclose where the employee worked (for instance, on the second floor), and what common areas the employee used (for instance, “the employee used the copier in the third floor break room, but did not use any facilities on floors 4-6).
- Conduct a thorough disinfection of the entire workplace and remind employees to practice proper social distancing and frequently wash their hands.

Answer #3b – Testing Positive (cont.)

- Employers are now required to determine whether a positive employee contracted the virus while at work.
 - This means conducting an investigation into whether the employee's infection is related to work.
 - A reasonable investigation includes:
 - Asking the employee limited questions about how he/she believes COVID-19 was contracted;
 - Asking about the employee's work and nonwork activities and possible exposure; and
 - Examining the work environment to determine if and how exposure was possible.
 - But beware of overstepping boundaries into an employee's personal life.
- If an employer is covered by OSHA, and an employee's infection is work related, and the infection results in (1) the employee's death, (2) time away from work, (3) restricted work/transfer, (4) medical treatment, or (5) the loss of consciousness, the employer must record the COVID-19 case on the OSHA 300 log.

Answer #3c – Employee Has Symptoms (Cont.)

- If an employee only shows COVID symptoms, but no positive test yet, the employee would likely still be considered a “known danger” to the workplace, and should be sent home.
- The ADA’s guidance has explicitly stated that being COVID-19 positive, or even showing symptoms of it, poses significant risk of substantial harm to the workplace.

Question #4 – Symptom Tracking

Are there ways for an employer to track an employee's COVID-19 symptoms while the employee is out on leave?

Answer #4 – Symptom Tracking

- Supplying ill employees with a self-certification and medical tracking chart is a good way to help employees track their symptoms to determine when they will be permitted to return to work.
 - NOTE: The CDC has changed its guidelines for returning to work from 7 days after the onset of symptoms to 10 days.
- The self-certification should include an employee attestation that:
 - The employee has not had a fever for at least three days without taking medications to reduce fever (while requesting the date of last fever of 100.4 degrees or higher); the employee's respiratory symptoms have improved for at least three days; and at least ten days have passed since the employee's symptoms first started.
- The medical tracking chart should include:
 - A spreadsheet that allows an employee to document his/her temperature, respiratory symptoms, and other symptoms; and
 - A disclaimer that the medical tracking chart is for the employee's use only and should not be provided to the employer.

Question #5 – Asymptomatic Employees

May an employer ask asymptomatic employees to disclose whether they have a medical condition that could make them especially vulnerable to COVID-19 complications?

Answer #5 – Asymptomatic Employees

- Generally, asking an employee about underlying medical conditions is a disability-related inquiry, which is highly restricted by the ADA.
- Because COVID-19 is a pandemic and is considered severe by health officials, employers have sufficient objection information to reasonably conclude that employees will face a direct threat if they contract COVID-19.
 - As such, an employer may make a disability-related inquiry of asymptomatic employees in order to identify those at higher risk of COVID-19 complications.
- Those at higher risk for severe illness from COVID-19, according to the CDC, are:
 - People 65 years or older;
 - People with chronic lung disease or moderate to severe asthma;
 - People who are immunocompromised; and
 - People with severe obesity, diabetes, chronic kidney disease, and/or liver disease.

Question #6 – Fear of Infection at Work

Is an employee able to take FFCRA leave due to his/her general fear of coming to work because of the risk of being infected by COVID-19?

Answer #6 – Fear of Infection at Work

- The employee is not missing work due to an FFCRA-approved reason, thus, he/she would not generally be entitled to paid sick leave under the Act.
 - Unless a quarantine, isolation order, or shelter-in-place order applies specifically to the employee (such as “all people older than 65 may not leave their house”), the employee would not be permitted to FFCRA leave simply out of fear of coming to work.
- There are a few limited circumstances where leave to avoid contracting COVID-19 might be covered under FMLA:
 - For example, if an employee has an underlying mental health condition (severe anxiety) which triggers an incapacitating fear of COVID-19, it could be considered a serious health condition as defined by the FMLA. (This would also trigger an ADA interactive dialogue.)
- Additionally, if the employee has an underlying chronic condition (diabetes, lung disease, asthma), and a health care provider advises the employee to stay home to avoid triggering the condition, the employee would likely qualify for FFCRA leave.
- Otherwise, staying at home simply to avoid getting sick, even for employees with underlying chronic conditions, does not qualify for leave, or as a serious medical condition under the FMLA.

Question #7 – Intermittent Leave

Are employees required to use the sick leave in 8 hour increments or can they use them as needed?

For example, if an employee is in self isolation, and he/she wants to work 4 hours in the morning, can they record his/her morning time as working, and then his/her afternoon time as COVID-19 related leave?

Answer #7 – Intermittent Leave

- Employees may not take intermittent paid sick leave if the employee is still working at the typical worksite (meaning, not teleworking).
 - Instead, the employee must take paid sick leave in full-day increments, unless (1) the paid sick leave is being taken for care of a child whose school or place of care has closed due to COVID-19 reasons, and (2) the employer agrees to such intermittent use.
 - Otherwise, once an employee begins taking paid sick leave, the employee must continue taking paid sick leave in full-day increments until (1) the full available amount of paid sick leave is exhausted; (2) the employee no longer has a qualifying reason for paid sick leave. Any unused sick leave may be saved and used later, until December 31, 2020.
- If teleworking, and the employer permits it, an employee may take intermittent leave for any reason in the FFCRA.
 - The increment of leave must be agreed to be employer/employee.

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