

Welcome to the SIG University Webinar Series  
**What Comes Next: Re-Opening the Workplace**

Douglas Desmarais, Esq. | *Smith & Downey*

*June 9, 2020*



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**QUESTIONS?**

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# UPCOMING WEBINARS

## **JUNE 10<sup>TH</sup>, 12 PM – 1 PM EST**

Affordable Care Act Update: What's New with the ACA

**Presenter:** Stacy Barrow, Esq., *Marathas Barrow Weatherhead*

## **JUNE 12<sup>TH</sup>, 9 AM – 10 AM EST**

Moving Out of Your Comfort Zone and Into the Struggle: A Discussion on Leading through Change

**Presenter:** Jeff Cherry, *The Conscious Venture Fund*

## **JUNE 16<sup>TH</sup>, 10 AM – 11 AM EST**

Returning to Work: Manager Education During a Period of Crisis and Unrest

**Presenter:** Doug Desmarais, Esq., *Smith & Downey*

# COVID-19 UPDATES

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**\*\*Newly Added Whitepaper\*\***

## Restarting & Rethinking Your Workplace: Crafting Your Return to Work Strategy

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

**ALERA GROUP**  
Restarting and Rethinking Your Workforce



### Road Map: Reopening A Worksite

Your workforce strategy before and after this crisis involves a lot more than "return to work." The health of your employees and clients, a fast-changing regulatory environment, potentially long term changes to how we work, and new or increased risks from both remote and on-site work.

At Alera Group, we provide comprehensive support to employers through our risk management, employee benefits, wealth management and human resources services, all of which are especially relevant during this crisis. If you need help crafting or executing your work strategy and playbook, talk to your advisor about how we can help.

#### Step One:

##### Pick a Champion



Your return to office champion can help implement changes, gather feedback and think through the unique elements of your organization's layout and needs.

#### Build a Plan for the Future

Future Crisis Planning

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- [Rethink and Reset Your Workforce During COVID-19](#)
- [COVID-19 Industry Impacts Whitepaper](#)
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# What Comes Next: Re-Opening the Workplace After COVID-19

June 9, 2020



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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.

# \*\*\*Race in the Workplace\*\*\*

- We are in the midst of a societal change perhaps like any seen in the past century as it relates to race relations.
- The scope of the current protests exceed those of the late 1960's.
- Social media has added an additional layer of urgency to these issues
- Many employees wish to discuss race relations with their coworkers.

What are the legal implications of doing so?

- Some employees want their employers to issue public statements about race relations.

What issues are involved in doing so?

# Question #1 – CDC Guidance

The Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) have released guidance for employers looking to reopen – are employers required to follow this guidance?

# Answer #1 – CDC Guidance

- The guidance issued by the CDC and OSHA is a series of recommendations and not all of them will be applicable to each employer reopening. So, reopening employers are not required to follow the guidance.
- However, the General Duty Clause under the OSH Act is still applicable.
  - 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.
- While the guidance issued is not technically required, under the General Duty Clause, it should be treated as a requirement.

# Question #2 – When to Reopen

Several states and municipalities have started the reopening process  
– when should an employer reopen its business and bring employees back to work?

# Answer #2a – When to Reopen

- Maryland: most of the state is in “Stage 2” – started June 5.
  - Non-essential businesses may reopen and certain personal services may resume.
  - Gatherings limited to 10 people.
  - Montgomery County, Prince George’s County and Baltimore City are not yet in Stage 2.
- Washington, D.C.: is currently in “Stage 1” – started March 29.
  - Stay-at-home order is lifted, nonessential businesses can open for curbside pickup/delivery, outdoor dining is available, personal services are open by appointment, and parks, field, tennis courts are open.
  - Gatherings limited to 10 people.
- Virginia: much of the state is at “Phase 2” – started June 5.
  - Restaurants can serve customers inside at 50% capacity, gyms can reopen at 30%, personal services can open by appointment, and zoos, museums and retail can up at 50%.
  - Gatherings limited to 50 people.
  - Richmond, VA, and Northern VA (Counties of Arlington, Fairfax, Loudoun, and Prince William, and cities of Alexandria, Fairfax, Falls Church, Manassas, Manassas Park, Dumfries, Herndon, Leesburg, and Vienna) will remain in Phase 1.

# Answer #2b – When to Reopen (cont.)

- Each state has its own guidelines and certain counties/municipalities have guidelines and requirements of their own – any business must determine if it able to comply with such requirements before reopening.
  - This means being able to enforce social distancing requirements, mask wearing, and capacity requirements.
  - Certain businesses in certain states must apply for certifications to reopen – employers should ensure all certification requirements are met before reopening.
- Telecommuting is still strongly encouraged, and employers should consider returning only certain employees and/or staggering shifts if it is necessary for these employees to return to the office.

# Question #3 – Reopening Guidance

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

# Answer #3a – 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 #3b – 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 #3c – 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 #3d – 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 #4 – Testing Employees

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

# Answer #4 – 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 #5 – Testing Positive

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

# Answer #5a – 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 #5b – 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 #5c – Employee Has Symptoms

- 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 #6 – Symptom Tracking

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

# Answer #6 – 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 #7 – 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 #7 – 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 #8 – 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 #8 – 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 #9 – 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 #9 – 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.

# Question #10 – FMLA+ First Two Weeks...

May an employee choose between available paid leave and EPSL for the first two weeks of FMLA+ Leave?

# Answer #10 – FMLA+ First Two Weeks...

- An employee may take both paid sick leave and expanded family and medical leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of FMLA+, which are otherwise unpaid under the FFCRA, unless the employee elects to use existing vacation, personal, or medical or sick leave under an employer's policy.
- After the first ten workdays have elapsed, the employee will receive 2/3 of his/her regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

# Question #11 – Documenting Leave

What documents should an employer request of an employee who is taking FFCRA leave, and how long should those documents be maintained?

# Answer #11a – Documenting Leave

- Leave documentation is necessary to ensure compliance with the FFCRA's tax credit provisions – employers will substantiate eligibility for tax credits if the employer receives documentation from an employee in which the employee provides:
  - The employee's name;
  - The date or dates for which leave is requested;
  - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
  - Statement that the employee is unable to work or telework for such reason.

# Answer #11b – Documenting Leave

- If leave is based on a **quarantine order** or **self-quarantine advice**, the statement from the employee should include the name of the government entity, or the name of the health care professional advising self-quarantine, and, if the person subject to the quarantine order is not the employee, that person's name and relation to the employee.
- If leave is based on a **school closing or child care provided being unavailable**, the statement from the employee should include the name and age of the child to be cared for, the name of the school that has closed or place of care that is unavailable, *and a representation that no other person will be providing care for the child.*
- Documents should be maintained by the employer for **four years**.

# Question #12 – Accommodations

Employees have been working from home for months now – must we accommodate their request to continue working from home under the ADA?

# Answer #12 – Accommodations

- A request for a reasonable accommodation under the ADA must account for all circumstances at the time the request was made – this means that circumstances have likely changed between the time the employee was working from home and the time the request was made (such as states entering into reopening phases).
- Any request to continue working from home should be met with a fact-intensive determination, and should consider the employee’s performance while working from home.
- Historically, courts have found that physical presence in the workplace can be deemed an essential function of the job – it is unclear whether employers can use this same defense if the employee is able to show that he/she successfully worked from home during the pandemic.

# Question #13 - FFCRA Noncompliance

Will there be risk if an employer has not fully complied with the FFCRA's leave requirements?

# Answer #13 – FFCRA Noncompliance

- There have been FFCRA noncompliance lawsuits brought by employees against employers as early as three weeks ago.
  - In *Jones v. Eastern Airlines*, the employee alleged that she was terminated as retaliation for requesting to work from home and alter her work schedule to care for her son.
  - The employee alleged she “formally requested” FFCRA leave but was met with “hostility” from the employer’s human resources officer who allegedly stated that the FFCRA is “there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself.”
- The probability of a successful lawsuit in such a situation is unknown, but the *Jones* lawsuit shows just how quickly one can be filed.
  - The FFCRA does not required aggrieved parties to exhaust administrative remedies prior to bringing a lawsuit.
  - The FFCRA permits remedies available under the FLSA, including liquidated damages.
  - And individual managers may be sued under the FFCRA.

# Question #14 – FFCRA Litigation Risk

What claims could theoretically be brought in a FFCRA lawsuit?

# Answer #14 – FFCRA Litigation Risk

- In *Jones v. Eastern Airlines*, the employee filed suit for FFCRA interference and FFCRA retaliation.
- In a separate lawsuit against Kroger, a terminated employee filed suit alleging that her termination violated both the FFCRA and the Family and Medical Leave Act.
  - The Kroger leave policy requires documentation including the employee’s name, diagnosis, date seen by a doctor, and a return-to-work date, all of which was required to be submitted within 3 days of the first absence.
  - Failure to follow Kroger’s policy would result in “attendance points,” which may lead to a termination.
- The *Kroger* case will test the theory that a COVID-19-related absence qualifies as a “serious health condition,” which would entitle the employee to 12 weeks of unpaid, job-protected, sick leave.
  - The *Kroger* plaintiff’s FFCRA claim is unlikely to succeed, as Kroger has more than 500 employees, thus, not covered by the FFCRA.
  - However, the FFCRA claim theorizes that Kroger voluntarily submitted to the FFCRA and should thus be required to comply with its provisions.

# Question #14a – Other Litigation Risk

Is there other litigation risk regarding COVID-19 and related issues?

# Answer #14a – Other Litigation Risk

- Whether covered by the FFCRA or not, the recent *Kroger* case highlights the risk of a breach of contract claim based on a sick leave policy.
  - Noncompliance with an internal leave policy can be a risk leading to litigation.
  - The *Kroger* case also highlights the risk of FMLA litigation.
- A complaint filed in mid-April (*Scott v. Hooters*) alleges violations of the WARN Act.
  - Employers with 100 or more employees are required to provide employees with 60 days notice prior to any plant closing or mass layoff involving loss of employment of more than 30 days affecting at least 500 employees, or 33% of the workforce if such percentage amounts to at least 50 employees.
  - There is an unforeseeable business circumstance exception to the WARN requirement, but notice is still required as soon as it is practicable, and the employer must provide good reasoning as to why the circumstances were unforeseeable and the notice was late.

# Answer #14a – Other Litigation Risk (cont.)

- ADA compliance:
  - Medical information should be kept confidential at all times;
  - Reasonable accommodation requests should consider the changed world brought about by COVID-19 (including increased risks for certain employees) as well as whether the employee has worked from home during the pandemic;
  - Stay informed on CDC guidance – temperature checks are fine right now, but if COVID-19's status is no longer considered a pandemic, this would likely change.
- Discrimination claims:
  - COVID-19 has caused necessary adverse employment decisions – employers must be aware of possible claims of discrimination and document the reasons for each adverse employment decision;
  - Employers should ensure that adverse decisions are based solely on legitimate criteria.
- Trade secret and noncompete litigation:
  - Employers should continue to ensure proper protection of their trade secrets and remind employees of their obligations under any restrictive covenant.

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