



**ATM
LAW**

WORKPLACE IMPLICATIONS AFTER THE COVID-19 CRISIS
May 12, 12 Noon | Free Webinar | Register At [Tamulawanswers.info](https://tamulawanswers.info)

Workplace Implications After the COVID-19 Crisis

TAMU LAW ANSWERS WEBINAR SERIES

Zoom meeting,
audio only

Zoom meeting
with video



Zoom Webinar Intro Information

- We are thankful to have so many in attendance.
- While panelists are attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

PAIGE P. BIGGS, Senior Counsel, KELLY HART

- Graduate of Baylor University School of Law.
- Practice focuses primarily on advising employers on labor and employment-related legal matters.
- Ranked one of the Top Attorneys in Labor and Employment Law in 2019 by 360 West Magazine.



ANGELA MORRISON

Associate Professor of Law, Texas A&M University School of Law



- Graduate of UNLV Law School and worked for U.S. Equal Employment Opportunity Commission as the first trial attorney in Las Vegas.
- Previously served as the Legal Director of the Nevada Immigrant Resource Project at UNLV.
- Teaching and research interests draw on her expertise in immigration and workplace law viewed under the lens of access to courts for victims of systemic employment discrimination and the impact of immigration status on the effective enforcement of laws meant to protect noncitizens as individuals.

JASON C.N. SMITH

Attorney at Work, Law Offices of Jason Smith

- Graduate of Texas Tech School of Law.
- Proven record of representing employees and obtaining jury verdicts against corporations and the government.
- Obtained the first sexual harassment jury verdict in Tarrant County.



MICHAEL Z. GREEN

Professor of Law, Director of Workplace Law Program



- Tenured law professor, member of inaugural Texas A&M Law School 2013 faculty with more than 30 publications covering workplace law viewed under the lens of dispute resolution and race and 20 years teaching related courses.
- Co-Author *ADR in the Workplace* (West 4th Ed. 2020) and 2020 forthcoming articles in the *Fordham* and *Seton Hall Law Reviews*.
- Member, College of Labor and Employment Lawyers and Member, National Academy of Arbitrators.

Safety: www.tdi.texas.gov/oshcon/index.html;
cdc.gov/COVID19; www.osha.gov/coronavirus

STOP THE SPREAD OF GERMS

Help prevent the spread of respiratory diseases like COVID-19.

- Avoid close contact with people who are sick.** 
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.** 
- Avoid touching your eyes, nose, and mouth.** 
- Clean and disinfect frequently touched objects and surfaces.** 
- Stay home when you are sick, except to get medical care.** 
- Wash your hands often with soap and water for at least 20 seconds.** 

 cdc.gov/COVID19

Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus

All workplaces can take the following infection prevention measures to protect workers:

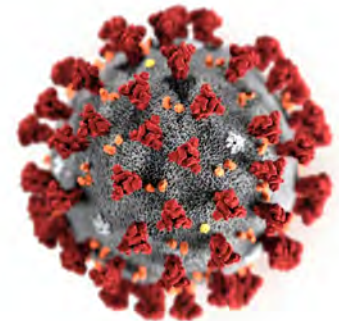
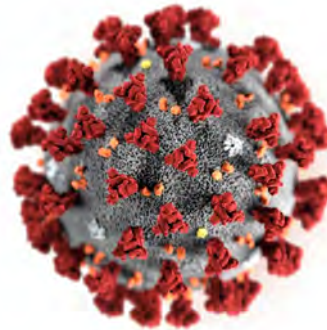
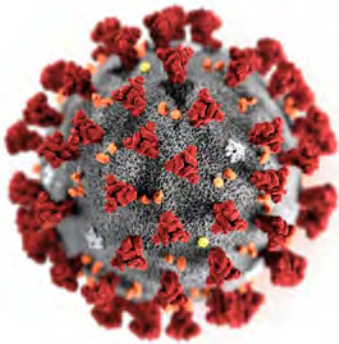
- 1 Encourage workers to stay home if sick.
- 2 Encourage respiratory etiquette, including covering coughs and sneezes.
- 3 Provide a place to wash hands or alcohol-based hand rubs containing at least 60% alcohol.
- 4 Limit worksite access to only essential workers, if possible.
- 5 Establish flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), if feasible.
- 6 Discourage workers from using other workers' phones, desks, or other work tools and equipment.
- 7 Regularly clean and disinfect surfaces, equipment, and other elements of the work environment.
- 8 Use Environmental Protection Agency (EPA)-approved cleaning chemicals with label claims against the coronavirus.
- 9 Follow the manufacturer's instructions for use of all cleaning and disinfection products.
- 10 Encourage workers to report any safety and health concerns.

For more information, visit www.osha.gov/coronavirus or call 1-800-321-OSHA (6742).

 **OSHA** Occupational Safety and Health Administration
1-800-321-OSHA (6742)
TTY 1-877-889-5627

So, What Happens Next?

What Employers Need to Know About Returning to Work After COVID-19 Shutdowns



**TEXAS A&M UNIVERSITY
SCHOOL OF LAW**

Topics to Be Covered

- Which guidance should employers follow?
- What precautions may employers take?
- May employers ask about symptoms?
- Must employees be compensated for time spent being screened before entering the workplace?
- What about antibody tests?



Levels of Government Guidance: Pay attention to all of them!



**U.S. Department of
Health and Human Services**
Centers for Disease
Control and Prevention

GOVERNOR'S STRIKE FORCE TO


OPEN TEXAS



Y'ALL GET READY.

RE-OPENING FORT WORTH THE RESPONSIBLE WAY

OSHA Regulations

- OSHA recently published COVID-19 workplace safety guidance outlining how employers can protect their workforce as well as new requirements for handling COVID-19 complaints, referrals, and reports. Many of OSHA's guidelines mirror state and federal guidance found elsewhere (i.e. handwashing, staying home, social distancing, etc.) but OSHA also provides specific guidance about implementing COVID-19 workplace policies.
- As for normal OSHA requirements, it is unclear how OSHA will handle non-healthcare industry enforcement during the COVID-19 pandemic. OSHA has indicated that in some situations inspectors may exercise discretion and look to whether employers made a "good faith" effort to comply with OSHA requirements in light of the circumstances. One factor for considering whether a "good faith" effort was made will be whether the employer puts in place interim alternative protections until OSHA requirements can be satisfied.



Employers May Take Employee Temperatures

- Taking temperatures impermissible under the ADA
 - The ADA prohibits medical exams during employment unless job related or consistent with business necessity
- ***Exception*** if an employee may pose a direct threat to others in the workplace due to a medical condition
 - EEOC guidelines provide that because COVID-19 is classified as a pandemic employees may pose direct threat to others if carrying the virus.
- Conclusion: Taking employee temperatures is allowed during this pandemic.



States Recommending Temperature Checks for Certain Industries

- **Texas**-Pursuant to the TX Dept of State Health Services guidance, COVID *symptom screening* required for retail business employees returning to work and recommended for other employers. Does not state that retail employers must do temperature testing but must screen for symptoms, one of which is temperature.
- Retail employees must be screened for shortness of breath, new or worsening cough, sore throat, loss of taste or smell, feeling feverish or a measure temperature greater than 100.0F, or contact with a person who is lab-confirmed to have COVID-19. Upon entering business employees must wash or sanitize hands. Employees must wear face coverings and remain 6 feet apart.
- Employers can be fined \$1000 for failing to comply with the Governor's Executive Orders. Notably, these orders specifically set out enforceable capacity restrictions (i.e. 25% for restaurants).
- Check local guidance.



Employers May Ask Sick Employees If They Are Experiencing COVID-19 Symptoms

- EEOC guidance allows employers to ask about potential COVID-19 symptoms if an employee otherwise reports feeling ill.
- Unclear whether employers may ask employees who have not reported feeling ill if they are experiencing any COVID-19 symptoms
- Conclusion: For now, avoid asking employees about symptoms unless they otherwise report feeling ill or you have a symptom screening policy.



Are Testing and Screening Compensable?

- Employees will have to spend time before work taking temperature and potentially answering questions if they feel ill. Are they entitled to pay?
- Probably not. Under the portal to portal act this time is likely a “preliminary activity” comparable to the time spent in a security line before work, which employers do not pay employees for unless pursuant to contract, custom, or practice. *See* 29 C.F.R. § 785.34; *see Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014) (“screenings were not the principal activity or activities which the employee is employed to perform.”)
- **But**, depending on the depth of screening, this time could also be interpreted as time “spent by an employee in waiting for or receiving medical attention...at the direction of the employer during the employee’s normal working hours,” which must be compensated. *See* 29 C.F.R. § 785.43; *see Sehie v. City of Aurora*, 432 F.3d 749 (7th Cir. 2005) (“the DOL has also issued opinions concluding that when an employer requires an employee to attend...examinations...during non-working hours as a condition of continued employment, the time spent undergoing such examinations constitutes ‘hours worked’ and is therefore compensable.”)
- Conclusion: to avoid this pitfall, make clear that screenings are not medical examinations.



Employers Can Require Employees to Wear PPE and Wash Hands

- Employers can and *should* require employees to wear personal protective equipment (PPE) like masks while in workplace common areas.
- If an employee has a disability and requests an accommodation to deviate from these protocols employers must engage in the interactive process required by the ADA.
- Conclusion: Adopt hand-washing and PPE policies in line with federal, state, and local guidance.



Employers Can Require Fitness for Duty Certification for Employees Returning to Work

- EEOC states that employers may require employees returning to work after recovering from COVID-19 to submit a doctors note certifying they are fit for duty.
- Practically, doctors may not have time to complete these exams right now so implementing this requirement may slow down the process of getting these employees back to work.
- Conclusion: Best practice is asking for a note but other business considerations may exist.



Serology Testing Should Not be Used

- Serology tests identify whether someone has antibodies to combat COVID-19.
- Most tests currently on the market are still in development and have high false negative rates.
- The WHO has stated that mere existence of antibodies does not mean someone cannot contract COVID-19 again.
- Further, these tests will not identify someone who currently has the virus and has not yet developed antibodies.
- In any event, Under EEOC guidance these tests are likely impermissible medical exams.



Unemployment Statistics

BACKDROP: The Highest Unemployment Rate since the 1930s Great Depression

In 2018, a Federal Reserve study found that 40% of American families could not handle a \$400 emergency.

Now the St. Louis Fed President James Bullard projects that the national unemployment rate will hit 32%.

JP Morgan has projected the unemployment rate will be just above 15% this fall.



COVID-19'S IMPACT ON NON-CITIZEN WORKERS & THEIR EMPLOYERS

MAY 12, 2020

ANGELA D. MORRISON, TEXAS A&M UNIVERSITY LAW SCHOOL



TODAY

- Protections in the Workplace
- Leave & Unemployment Insurance
- Employment Verification Process
- Visa & Employment Authorization Document Processing

PROTECTIONS IN THE WORKPLACE

| Law | Protection | Restrictions? |
|-----------------------------------|---|---|
| Title VII, ADEA, ADA & Amendments | Prohibit discrimination on basis of <u>race</u> , color, religion, sex, <u>national origin</u> , age, or <u>disability</u> ; prohibit retaliation | Yes. Remedy limited for unauthorized workers. |
| OSH Act | Protects worker health & safety; prohibits retaliation | Likely no remedy for unauthorized workers. |
| NLRA | Provides right for collective action; prohibits retaliation | Yes. No remedy for unauthorized workers. |

LEAVE & UNEMPLOYMENT INSURANCE



EMPLOYMENT VERIFICATION



Employment Eligibility Verification
Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-9
OMB No. 1615-0047
Expires 10/31/2022

► **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers **CANNOT** specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation *(Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)*

| | | | | | | | |
|------------------------------------|-------------------------------|---------------------------|-----------------------------|------------------|----------------------------------|-------------------------------|------------|
| Last Name (Family Name) ? | | First Name (Given Name) ? | | Middle Initial ? | Other Last Names Used (if any) ? | | |
| Address (Street Number and Name) ? | | | Apt. Number ? | City or Town ? | | State ? | ZIP Code ? |
| Date of Birth (mm/dd/yyyy) ? | U.S. Social Security Number ? | | Employee's E-mail Address ? | | | Employee's Telephone Number ? | |

VISA & EAD PROCESSING

The screenshot shows the top navigation bar of the USCIS website. On the left is the USCIS logo and the text "U.S. Citizenship and Immigration Services". In the center is a search bar labeled "Search our Site". On the right are social media icons for Facebook, Twitter, YouTube, and LinkedIn, along with a "Need Help? Ask Emma" button featuring a woman's profile picture. Below the navigation bar is a horizontal menu with categories: FORMS, NEWS, CITIZENSHIP, GREEN CARD, TOOLS, and LEGAL RESOURCES. A prominent red banner with a white exclamation mark icon contains the text: "USCIS Offices Temporarily Closed to the Public. USCIS Response to Coronavirus 2019 (COVID-19)." Below the banner, the breadcrumb trail reads "Home > About Us > USCIS Response to COVID-19". To the right of the breadcrumb are links for "Versión en español", "Share This Page", and "Print". The main content area is titled "USCIS Response to COVID-19". On the left side of this area is a sidebar menu under the heading "About Us" with expandable items: "Contact Us", "Find a USCIS Office", "Budget, Planning and Performance", "Citizenship and Assimilation Grant Program", and "Directorates and Program Offices". The main text area contains the following information: "On March 18, U.S. Citizenship and Immigration Services temporarily suspended routine in-person services to help slow the spread of coronavirus (COVID-19). USCIS plans to begin reopening our offices on or after June 4, unless the public closures are extended further. USCIS staff are continuing to perform duties that do not involve face-to-face contact with the public. However, USCIS will provide emergency services for limited situations. To schedule an emergency appointment, contact the USCIS Contact Center." "During this time, individuals may still submit applications and petitions to USCIS. Online filing remains the most convenient and interactive way to submit forms, check the status of your case, and receive notices." "USCIS will provide further updates to this page as the situation develops and will continue to follow CDC guidance." At the bottom right of the main text area are buttons for "Close All" and "Open All". Below the main text area, a partially visible link for "Field Office Appointments and Rescheduling" is shown.

U.S. Citizenship and Immigration Services

Search our Site

Español | About USCIS | Contact Us

Need Help? Ask Emma

FORMS NEWS CITIZENSHIP GREEN CARD TOOLS LEGAL RESOURCES

! USCIS Offices Temporarily Closed to the Public. USCIS Response to Coronavirus 2019 (COVID-19).

Home > About Us > USCIS Response to COVID-19

Versión en español Share This Page Print

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USCIS will provide further updates to this page as the situation develops and will continue to follow CDC guidance.

Close All Open All

Field Office Appointments and Rescheduling

A Final Note About Workers: Thank you!

Doctors, nurses, first responders, grocery store, public utility and transportation, restaurant, tissue paper, meat and other food processing, package and food delivery, and all the many other workers out there facing uncertainty. We appreciate you and hope that we all learn something about how to make the workplace a little better despite Covid-19.



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<http://tamulawanswers.info/>



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SCHOOL OF LAW

NEED ADDITIONAL ASSISTANCE? The Tarrant County Bar Association offers free advice on “LegalLine”

LegalLine is a community service program offered twice a month by the Tarrant County Bar Association. Volunteer attorneys from the Tarrant County Bar Association offer free advice to Tarrant County residents on the 2nd and 4th Thursday of every month from 5–7pm.

As part of the Tarrant County Bar Association’s commitment to the public, local lawyers volunteer two hours of their time to answer questions covering a broad range of topics.

Anyone interested can sign up for an appointment time at tarrantbar.org

