



TEXAS A&M UNIVERSITY

School of Law

“TAMU Law Answers” Webinar Series

LEGAL ISSUES IN THE AGE OF THE CORONAVIRUS

“Workplace Implications After the COVID-19 Crisis”

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Presenters:

- Paige P. Biggs, Kelly Hart, Senior Counsel
- Angela D. Morrison, Texas A&M University, Associate Professor of Law
- Jason C.N. Smith, Law Offices of Jason Smith
- Moderator: Michael Z. Green, Texas A&M University, Professor of Law, Workplace Law Program Director

While the panelists are all 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.

TRANSCRIPT:

- Welcome, everybody. Howdy. My name is Michael Green, professor of law at Texas A&M University School of Law, where I'm the director of our Workplace Law Program. We're focused on practical application of workplace law for our students with a course concentration and out-of-the-class experiential work and a great student organization called ELLSA.

We have a burgeoning commitment to develop a niche in this field through inviting scholars, alumni, and attorneys for webinars just like the one you're about to watch that covers important workplace law topics. This particular webinar is part of a series of what we have called our “TAMU Law Answers Webinar Series.”

All of the webinars in this series have addressed matters arising as a result of the coronavirus, providing insights from experienced Texas A&M Law School faculty and legal community experts. We started off with the CARES Act Webinar Series that focused on legislation looking at individual incentives, small business incentives, health care implications, and housing.

Our webinar today is part of a series on broader legal issues in the age of the coronavirus. We had the first webinar in this series this past Thursday on bankruptcy issues. And today, we cover workplace issues. We are developing other webinar series, some on business issues that will be developed, and you'll get more details on that on our webinar page, <http://tamulawanswers.info>.

With all of these webinars, my colleague Gabriel Eckstein has been behind the scenes planning logistics, working with Kirsten Evans from our Marketing and Communications Department, and we want to thank them for all the hard work involved in making this webinar happen. Now, let me shift to a few housekeeping matters and then tell you who are presenters are.

Each presenter will have about eight minutes. When all three are finished, we will use the remainder of our time to answer your questions. The "ask a question" function is available to you at the bottom of your screen. We ask that you try to use this function primarily on raising questions that would go directly to the presenters during the Q&A session.

Also, this webinar is being recorded. The video, its transcript, and any PowerPoint slides will be posted on our website at tamulawanswers.info. Now, let me mention our three presenters.

Oh, but before I do that, I'm required to provide the following disclaimer. While all the 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.

Now, the presenters' profiles are available on the website where you registered, so I won't take time with that. Let me just say our first presenter will be Paige Biggs, who's a senior counsel at Kelly Hart. She practices primarily advising employers on labor and employment-related matters. She was ranked one of the top attorneys in labor and employment law 2019 by "360 West Magazine."

And our next speaker will be Jason Smith, who has a proven record of representing employees and obtaining jury verdicts involving corporations and the government. He obtained the first sexual harassment jury verdict in Tarrant County.

Last but not least, I'm grateful to have my Texas A&M Law professor colleague Angela Morrison. Angela worked for the US Equal Employment Opportunity Commission as a first trial attorney in Las Vegas, and she previously served as the legal director of the Nevada Immigrant Resource Project.

All right. Paige, it's up to you. You've got the cue.

OK. Good morning, everybody. Thank you so much, Michael. It's a pleasure to be with you guys today. As Michael mentioned, my name is Paige Biggs, and I'm going to go ahead and start. I have a PowerPoint that will help you guys follow along, so I'm going to go ahead and start sharing my screen with you guys.

All right. So I am going to spend the brief time that we have together today talking about some best practices for employers and some things that employers should keep in mind as our country and our state opens up and as employees start to gradually begin returning to the workforce.

And specifically, I'd like to take you through some guidance that employers should keep in mind, and some do's and don'ts that they also want to keep in mind in getting everything up, and rolling, and reopening. So we're going to talk about guidance. We're also going to talk about precautions that employers will want to take in order to help them establish and maintain a healthy and safe workforce.

We're going to talk about some tools that employers have at their disposal, things like temperature testing, COVID-19 testing, COVID-19 symptom testing, some questions and inquiries that you can ask your employees about COVID-19 symptoms, and then also some medical documentation that you can solicit from employees who have recovered from COVID-19 and are seeking to return back to the workforce.

So let's first talk about all of the government guidance. There is a whole lot out there, and you need only Google to see it all. It can be a little bit overwhelming, particularly where as here the mandates, and the orders, and the guidance is ever-evolving and ever-changing given that COVID-19 is a fluid situation, and there are still a lot of unknowns.

But we're going to hit some of the high points of the guidance today. This is by no means an exhaustive overview of all the guidance that is available out there to employers. Our time limits simply don't allow for that. But I intend to hit some of the highlights with you today and pull out those things that I think will be most beneficial to employers in keeping their workforces safe, and healthy, and free from the coronavirus.

So there are a few different forms of guidance that are available to employers. The guidance first comes from the federal level. That's the CDC guidance. That can be guidance from OSHA or guidance from administrative agencies like the EEOC. You also see guidance at the state level. Those are those executive orders that we've been hearing about from Governor Abbott.

And then there are state agencies that help implement those executive orders and give employers guidance about how to follow those. In Texas, that would be the Texas Department of State and Health Services. There is finally guidance that comes from the local level. And in the era of corona and in the current pandemic environment, this local guidance can be really important.

And what I'm talking about here is guidance at the county level and guidance also at the city level. So it's really important for employers to understand number one, which jurisdiction they're operating in and what guidance, whether it be federal, state, or local is applicable to that jurisdiction, and then secondly, to make sure that they are looking at the most current and most updated versions of the guidance that's available.

So let's jump. A little bit more specifically into OSHA. OSHA obviously is the federal agency. And OSHA recently published some COVID-19 workplace guidelines. They are called "Guidance on Preparing Workplaces for COVID-19." That guidance from OSHA is particularly

helpful to employers because it sets out steps that they can take specifically to help protect their workforce.

And the way that OSHA guidance is set out is it divides workforces into four levels of risk depending upon the potential exposure to COVID-19 in that particular environment. So, for example, there are high-risk environments like health care practitioners who are actively interfacing and treating patients that have tested positive for COVID-19.

And then there are lower-risk environments, maybe like office buildings where you aren't frequently having interactions with the public and are less likely to be exposed to COVID-19. And so for each of those levels of risk, it sets out specific steps that employers can follow and implement in the workplace. So I would really encourage all employers to start there first. Start with the OSHA guidance first in developing your protocols.

Also in April of this year, OSHA released interim enforcement guidance for assessing employers' compliance efforts. And what is good news for employers is that OSHA said if an employer is not in compliance with OSHA's standards, inspectors are expected to assess their compliance using good faith efforts to comply.

And that means that the employer, even if you were found to be violating OSHA and not to be in compliance with these COVID-19 guidelines, the inspector is instructed to examine your good faith efforts and exercise their enforcement discretion accordingly. And there are seven examples listed in those enforcement guidance that are specific examples where OSHA encourages inspectors to use their discretion and look at good faith efforts.

So one thing that employers can do in order to help keep their corona-- excuse me, their workplace corona-free is to take employees' temperatures. Now, traditionally under the ADA, the Americans with Disabilities Act, which is a federal act, employers are not permitted to take temperatures unless it would be job-related or consistent with business necessity.

But there is an exception if an employee poses a direct threat to others in the workplace. And the EEOC has recently come out and said that because COVID-19 is classified as a pandemic, employees may pose a direct threat to others if they are carrying the virus. And so that guidance enables employers to test employees' temperatures.

So taking employee temperatures is allowed during this pandemic, and in fact, it's encouraged in order to keep your workplace safe. You can do that a couple of different ways. You can sort of move through it using the honor system, where you have employees test their own temperatures, and then report those to you. And if they have a temperature over 100, you would then take steps and inquire about the symptoms as we're going to talk about here in a moment.

Or you can designate someone within your operation to take employee temperatures. Now, obviously, that presents some unique risks to that particular person. So you would want to make sure that you equip them with the tools that they need, like proper protective equipment, and a screen shield, and things that they can wear in order to keep themselves safe while they're taking the temperature. So that's something that you would want to keep in mind.

Also, if your operation does business in the state of California, then you'll need to provide a notice prior to or at the same time as you take the collection. Also, Texas has issued some guidelines as to how you can screen your employees. They're not mandatory under the executive order from Governor Abbott, but they're certainly encouraged.

You can ask employees if they're experiencing COVID-19 symptoms. If they otherwise report feeling ill, you are certainly encouraged to and expected to ask about their symptoms. For now, I would avoid asking about COVID-19 symptoms unless an employee otherwise reports feeling ill. I'm going to skip over this slide in the interest of time.

Also, you can and should require your employees to wear PPE while in the workplace. If an employee has a disability whereby they might not be able to wear the PPE, then you should engage in an interactive discussion about that and see what you can come up with.

And you can also ask for fitness for duty certification for employees who are returning to work after recovering from COVID-19. You could ask them to submit a doctor's note certifying that they are fit for duty. The best practice here is to ask for a note, just to make sure that they are 100% safe and ready to come back.

At this point, you can test for COVID-19. That's very clear under the EEOC's guidance. But I would not advise that you do serology testing, which is some of the testing that they can do for whether an employee may have antibodies. There are a number of reasons on the PowerPoint why you shouldn't do that. But at this point, I would stay away from that and just stick to some of the other forms of testing that we've talked about. Thank you.

- All right. Now, we have Jason.

- Thanks, Michael. My name's Jason Smith. I represent primarily employees in Fort Worth.

And our phone has been ringing off the hook from people with employment issues related to unemployment, related to FMLA, and related to employers taking advantage of a really dicey employment market to make some illegal decisions about who stays and who doesn't.

I want to start with the backdrop of unemployment statistics that's informing employment decisions right now. We have the highest unemployment rate since the 1930s Great Depression. The Department of Labor reported last week that we had a 14.7% unemployment rate. This goes in the backdrop of in 2018, the Federal Reserve did a study that 40% of American families couldn't handle a \$400 emergency.

Of course, this situation is much more than a \$400 emergency. The St. Louis Fed president James Bullard has done a lot of study on the employment situation, and he projects that the national unemployment rate will hit 32% before we're done this summer. We have 33 million people right now who are on unemployment benefits.

That doesn't include people who are not on unemployment benefits but are unable to do part-time, unable to look, or are not willing at this point to look for part-time or full-time work. Then

finally, JP Morgan has projected that the unemployment rate will be just above 15% this fall. And so all of that is unfortunately the backdrop in which employees find themselves.

Let's talk a little bit about unemployment. Congress expanded unemployment benefits, first of all, for self-employed persons and gig workers. Normally, those folks aren't eligible for unemployment. They are when the president declares a state or an area a disaster area. And what's more, Congress passed an additional 13 weeks of unemployment that would be extended to self-employed persons and gig workers.

So my number one piece of advice for anyone calling with an unemployment question about, am I eligible, is, file for unemployment and then let the system figure it out. We have expanded unemployment to gig workers, to part-time workers, to self-employed persons. We also have unemployment being extended.

Now that the governor has loosened some of the restrictions, we have employees being called back to work. And the governor has issued an order saying that if an individual can't go back to work because of child care issues, that they can remain on unemployment. In addition, the governor has waived the one-week waiting period.

You normally had to wait a week before you could file for unemployment, and the governor's waived that period. In addition, the governor has waived the requirement that you have to look for replacement work. Now, that requirement is going to end, is going to be reinstated shortly, but those things are present.

But with all of the folks being called back to work, some employers are reporting that what I hear a lot of is employees who have been called back to work are fearful that they're going to be exposed to COVID-19 or that they have childcare issues because their children aren't in school. I have 10-year-old twins that are doing Zoom classes right now.

And a lot of folks don't have childcare alternatives because a lot of childcare facilities are not open except to essential workers, and a lot of childcare facilities are just accepting a limited number of folks. So you have those folks not able to go back.

If someone is called back to work, and they don't take a job, and they don't have either COVID symptoms-- and we'll get to the new Family Medical Leave provisions in a minute-- or they don't have childcare issues, then technically, they could be reported to Texas Workforce Commission, and their unemployment could be discontinued.

And sadly, the governor has threatened to investigate people for fraud if they don't go back to work, and they don't have an excuse. We have a lot of people that are fearful. And, in fact, when this package was passed to extend unemployment benefits, the idea was to provide benefits through July so people wouldn't feel compelled economically to risk their health and risk others' health by going back to work.

Related to that, the state provides a minimum level of unemployment benefits, and that really is an insurance program paid for by payroll taxes. And individuals, they have an eligibility for a

minimum amount of about \$236, anywhere from \$236 to just over \$500 a week. In addition, the federal government has funded and is paying an additional \$600 a week on top of that state portion.

And that \$600 a week paid in addition is going to be paid through the end of July. But at the end of July, we're going to have a lot of people when those benefits run out, we're going to have a lot of people looking for work in a very tight labor market. There are some areas that are in demand. Health care, Amazon I know is hiring, Lockheed is hiring.

But a lot of other employers, there's a very tight market. This dovetails with the Family Medical Leave Act. In general, the Family Medical Leave Act, signed into law in 1993 by President Clinton, provides employees 12 weeks of family medical leave for certain issues if they have a health condition, if they have a loved one who has a health condition, if someone dies and they need to take leave, and some other limited reasons.

Congress passed earlier this year, in light of the pandemic, some additional reasons. If you have COVID-19 symptoms but they don't necessarily rise to the level, or you've been exposed to COVID-19, or you have been asked to stay home by a government official because they think that you've been exposed, or that you've been quarantined, or if you have a child home from school because their school has been closed, and you have no child care related to COVID-19 issues, then an employee can take leave.

In addition, for the first time in this country, for employers with less than 500 employees but more than 25, employers have to provide a certain minimum payment of paid leave if they want to retain employees. And that paid leave is a minimum of \$200 a week for 10 weeks.

If you have symptoms, they're required to pay you for two weeks, even if you are going to be at some point laid off. And this also dovetails with the Paycheck Protection Program, which provides that some amounts of the loans made to small businesses to pay payroll, those can be waived if the employer retains 75% of their employees and doesn't lay them off.

So that dovetails with the Family Medical Leave provisions. And we've been getting a lot of phone calls, especially from people who don't want to go back to work. They're fearful of being exposed.

The Family Medical Leave Act doesn't extend to those people who have fears. If they have symptoms that they're seeking treatment for, then they can get medical documentation and take that family medical leave.

And then the third area I want to talk about is when you have a tight labor market, unfortunately it is ripe for an opportunity for employers and managers to make improper considerations in making employment decisions.

I've received calls from individuals where the employer has laid off only the employees who filed FMLA in the past, or only employees who have filed Worker's Comp claims in the past, or

they've targeted that employee who filed that sexual harassment claim against the owner. And we're going to have a very tight labor market for at least the next two years.

And I hate to say that to folks that are going to be coming out of law school into a tight labor market, but that's the reality. And so we're going to have more and more employers either in hiring or firing decisions use these improper considerations.

Maybe you have someone that's a racist or a sexist making those decisions, and they're hiring less qualified, or terminating less qualified, or they're retaining less qualified employees, or they're hiring less qualified persons because they're white males, or because of some other improper consideration.

So the three things, again, are unemployment benefits have been expanded, although at the end of July, a lot of those benefits are going to cease, at least at this point. They could be extended. I don't know that the \$600 a week additional payment will be extended, and we're going to have a lot more people in a very tight labor market.

Second, Family Medical Leave Act has expanded the protection to take family medical leave for at least 12 weeks to retain your job. And then finally, unfortunately, watch out for improper considerations made in hiring and firing decisions by employers as the labor market becomes worse and worse. I wish everyone luck, and stay well, and I look forward to a conversation about your questions.

- Thank you, Jason. Let's move on to Angela.

- Hello. So I'm really glad to be here. And thanks to Gabriel and to Michael in the law school for organizing this, and thanks to both Jason and Paige for being on this panel with me. So today, I'm going to go ahead and talk about issues that may come up with noncitizen workers for both the workers themselves and for their employers.

So my plan is to talk about protections in the workplace that apply to noncitizen workers, how leave and employment, unemployment insurance may affect noncitizen workers, any changes to the employment verification process, and some of the issues that are coming up around visa and employment authorization document processing.

And when I'm talking about noncitizen workers, I'm just referring to workers who aren't citizens. It could cover a range of immigration status from people who either have legal permanent resident status-- so those are people with green cards-- to people who have deferred action for childhood arrivals, or even people who lack immigration authorization or work authorization.

When it matters, I'll specifically point out the type of immigration status that I'm referring to. OK. So first, I want to highlight some of the protections in the workplace that may or may not apply to noncitizen workers, mainly focusing on the kind of issues that may be coming up in the workplace post or during the COVID-19 pandemic.

So first, if we look at the different laws, so we're looking at Title VII, AEDA, to some extent ADA, and its amendments. And so those laws, as both Paige and Jason hit on some of these aspects, prohibit discrimination on the basis of race, color, religion, sex, national origin, disability status, and they also prohibit retaliation.

Those protections apply to all workers in the workplace regardless of their immigration status. What may change is the extent to which the worker may be able to seek a remedy under the various statutes. So for Title VII and the ADA in particular, workers can seek compensatory and punitive damages.

So they can get damages for actual harm that happened to them and damages that are meant to deter employers from engaging in that behavior in the future. But there are going to be limitations on other types of remedies. As far as the OSH Act which covers worker health and safety and prohibits retaliation against workers who complain, again, all noncitizen workers are able to get protection under that.

There may be some limitations with respect to workers who lack immigration status. They're not going to probably get back pay or some of the other remedies that are available under the OSH Act. And then the final protection in the workplace that I was going to talk about is the National Labor Relations Act. And for that one, it provides a right for collective action, prohibits retaliation.

And there again, the protections technically apply to all workers, but there is no remedy for workers who are unauthorized. So moving on to leave and unemployment. So as far as leave goes, so for leave, all employees are covered by the FMLA, as well as the provisions of the Families First Coronavirus Response Act and CARES Act, regardless of their immigration status.

So if those laws otherwise cover the worker, then they're eligible for leave under that, regardless of immigration status. With employment insurance, there are some variations in that depending on immigration status.

So for Texas state and federal law, a worker must be work authorized during the base period of employment, so the period of employment that the Texas Workforce Commission uses to determine what the pay should be. During that time, they must be work authorized at the time that they applied for the unemployment insurance.

And then they must continue to be work authorized during the payment period of unemployment insurance, because the employee must be able and available to work. It's unclear how limited that unemployment insurance may be under the pandemic unemployment assistance program. At minimum, it says that it covers covered individuals that may receive assistance.

And that would require workers to be able and available, so it likely covers the same workers that regular unemployment insurance with some of the expansions to independent contractors, gig workers that might not otherwise. But as far as noncitizen workers go, they're definitely going to have to be probably work authorized to be able to claim that insurance.

Importantly for noncitizen workers, however, is that the unemployment insurance benefits are not going to be a factor when immigration makes determinations on public charge. And that's because unemployment benefits are earned benefits and not public benefits. So that's not going to account against non-citizens when they apply for future immigration benefits.

So as far as employment verification goes, even during the suspension of USCIS and some DHS operations, employers are still required to verify both their employee's work authorization status and their identity. There have been some changes they've made with respect to the pandemic.

So for example, with e-verify, there's an extended time period for employees to respond to tentative non-confirmations since social security offices are closed. But employers are still required to open cases for new hires within three business days. They still have to use the same hire date that they would normally use.

And then as far as with I-9 forms go, the USCIS and DHS are actually allowing employers to remotely inspect and remotely retain or obtain documents related to the I-9 form. So that's something that wasn't possible before, but it only applies to workplaces that are operating remotely.

So for workplaces that have workers that are both operating remotely and in-person, those I-9 verifications and documents still have to be inspected and obtained in-person. There is a special note here, though, for employers.

So for employees who take leave or who the employer keeps on payroll, say, during a shutdown, the employer should not reinspect or reverify the documents because this isn't considered a new hire. And in fact, if an employer does that, that could be discrimination on the basis of national origin or immigration status, depending on the circumstances.

Finally, with respect to visas, and employment authorization documents, and how those are now being processed in light of closure of USCIS and consulates abroad, there's two different ways in which these visas and EADs might be affected. So as far as renewals go, USCIS is still going forward with renewals of visas or with employment authorization documents.

And they will be using biometrics that are already on file. So as long as immigration was already ready to process and the only thing that's holding it back are the biometrics appointments, then they're going to go ahead and process those. There are different considerations, though, for new visas. So there was an order that the administration issued that put a 60-day hold on immigration visas.

That started on April 23, but its impact was very limited. So it was only a hold on certain family members of US citizens or permanent residents who reside abroad, for immigrants who are applying through the Diversity Visa Program, and some workers who are residing abroad and are being sponsored by employers.

But that hold isn't going to apply to people coming to the country for tourism, business, temporary workers such as agricultural workers or skilled workers, as well as the spouses or

children of current green card holders that are here in the US, or people who have approved green cards that haven't received them yet.

And then, of course, for people who are here in the US and are applying for green cards on adjustment of status, it's not affecting them. But regardless, there still may be delays for new visas because of the lack of in-person appointments both for the biometrics and for required interviews.

So that concludes what I wanted to cover as far as the impacts on noncitizen workers. And, of course, if there are any questions or answers in the Q&A period, I'm happy to answer them.

- All right. Well, thank you very much, Angela, and thank you all three of the presenters. We have a couple of questions in the Q&A. And actually, both of them are for Paige, so I'm going to mention them. But actually, we received some questions beforehand. So when I go to these two questions for Paige, after she finishes, I have two for Jason and two for Angela as well. So it's a shared responsibility issue there.

So Paige, the first question that we received says, "A restaurant in Dallas recently told their employees if they insisted on wearing masks, they would be fired. Is this legal? Does it open the employer up to liability?"

- In Dallas County now, as I understand the current restrictions, restaurant workers are required by the county law to wear a mask. And so at this point, if a restaurant worker were not able to, were deprived of that opportunity, that would go against Dallas County order.

Now, I remember seeing an article on the case that the questioner is referring to involving that restaurant group where they were telling employees, look, that goes against our message and our vision, and we don't want you wearing masks to work. I believe that employee then obtained legal representation and filed the lawsuit, and that the court in Dallas issued a temporary restraining order that enabled that employee, at least, to wear a mask to work.

And now, I think the problem has largely been resolved by the changes in the Dallas County orbits. But certainly, if you're in Dallas County, people need to wear a mask at restaurants-- workers, rather. And you also need to make sure that you check whatever local laws, whether it be county or city, that apply to make sure that you're complying with those.

And obviously as a practical matter, the intent behind this is to help stop the spread of corona. If your employees want to wear a mask, whether it's required or not, it's likely in their best interests. If it lets them feel more safe, certainly it's best practices to let your people wear a mask, particularly if they're interfacing a lot with the public, as restaurant workers are.

- All right. Well, thank you, Paige. Let me go to the second question for you, and then I'll go to the two I have for Jason and Angela. It says you recommend. I don't know if you did recommend this, but it says you recommend to not ask COVID-19 symptoms, not ask about COVID-19 symptoms unless the employee is already showing signs of being ill.

We happen to be a health care facility. We currently have employees answer pre-screening questions, the same pre-screening questions we ask our patients, and that includes their symptoms. We do a daily temperature check. Is there any issue with this since we're in health care about asking employees the same questions that we ask our patients?

- I think at this point, the temperature checks, number one, are a good idea. Those are certainly, they've been sanctioned by the EEOC, and there's no issue with doing that. And if employees have a temperature over 100 degrees, you certainly should explore that and ask about potential symptoms.

I think in the health care industry-- and I did say that at this point, it's a little bit unclear as to whether you can go into symptoms if someone's not exhibiting symptoms. At that point, if you're going to direct those questions toward a specific employee, you want to make sure that you have some kind of reasonable belief that they have been exposed to COVID or are exhibiting symptoms.

I think the health care industry is a little bit unique given the high risk that exists there when you're interfacing with patients and people who are potentially ill on a daily basis. I think out of an abundance of caution, though, it's probably best practice not to ask people until you actually have a reasonable belief.

But with that said, the EEOC has said that you can test for COVID before employees enter the workplace, regardless of whether or not they're exhibiting symptoms. And so that might be another way, and the temperature controls, might be another way to monitor that without overtly asking them about the symptoms.

Now, if you see someone who's obviously exhibiting symptoms of COVID like fatigue, difficulty breathing, fever, cough, things of that nature, you can certainly, you can and should go to them and ask about those symptoms, and explore that further. So I think best practices at this point is to wait until someone's actually exhibiting symptoms before you ask those questions, but you can do the testing before that.

- All right. Thank you, Paige. Let me ask this one for Jason. This is a pretty kind of interesting question about Workers' Comp benefits.

It says Workers' Comp benefits generally aren't available for diseases because they're usually considered to be outside the scope of employment. Do you think that there will be any changes to this with the COVID-19, given that some employees and now working in more risky jobs like meatpacking and nursing homes?

- Yeah, I think it's a great question. It's not that diseases can't be covered under the Workers' Comp Act. But practically, it's very difficult to establish causation from being engaged in the course and scope of your employment.

For instance, firefighters have worked for and passed a provision of state law that provides that if a firefighter dies of certain types of cancer, that it is presumed that those cancers are related to

the course and scope of their employment, because being exposed to certain types of fires has a correlation to a certain type of cancer.

The problem is going to be if someone does contract coronavirus, then can you establish that they got it in the workplace, because there are so many other opportunities where they could get it. Now, nursing homes, there are a lot of clusters in nursing homes.

And an epidemiologist could probably establish causation where an individual was subjected to course in scope, and that's if they have Workers' Comp. If the employer is a non-subscriber and they've chosen not to have the protection of Workers' Comp benefits, then they may be sued by the employee for negligence that occurs on the job.

And again, if you could establish the causation, then you could recover against the employer. The tough thing is establishing that causation I think is the practical problem with that situation.

- And you mentioned earlier about possibilities of allegations of fraud for employees who are legitimately concerned about coming back to work. Do you think that they would be able to get unemployment? I think the Texas Workforce said that they'd take those on an individual basis.

Do you think they'd be able to get unemployment, and what about for workers who have no signs, no signs of the COVID virus, but maybe they have someone at home who is vulnerable? Could they also get those kind of employment benefits?

- Yeah. This is where I think the FMLA dovetails and interacts with the Unemployment Act here in Texas. If you qualify for Family Medical Leave-- and remember, we have some amendments that expand Family Medical Leave to not only having symptoms, but being present with another individual who has symptoms who is staying home or staying home with your child.

Then under the Family Medical Leave Act, you are to be excused from employment, and you're going to be eligible for unemployment benefits, at least for that 12-week period. So interestingly, I think at least for 12 weeks, an individual who had no symptoms but was at home with someone who had COVID-19 symptoms could obtain benefits.

With regard to the fraud question, sadly, I think this governor has sent very mixed messages about what he is going to do and who he is going to favor in this process of coming out. I think everyone saw that the governor issued an order putting restrictions to stop the spread of COVID-19.

He made public pronouncements that individuals who violated those and employers that violated those rules and businesses that violated those rules could face 180 days in jail. We had a salon owner in North Dallas who defied that order, was held in contempt of violating that law, and was sentenced to seven days in jail.

And then the governor attempted, at least, to retroactively change his order. And I think regardless of what you think of that policy, it sent a very mixed message to not only individuals, but employers that the governor can change his mind, and he can change his mind retroactively.

So he could say today that it's OK to file for unemployment benefits even if you've got a kid at home. But then what's to prevent him three weeks from now to say, retroactively, I'm not going to allow that, and to come after folks with benefits? I think the governor's just done a poor job of being a consistent leader after initially sending some very strong signals that he was going to issue some orders that protected individuals and workers' health and safety.

- Thank you, Jason. Angela, let me ask you. In your slides, you mentioned a number of laws that noncitizen workers might use to kind of protect themselves during this COVID virus, like the National Labor Relations Act, employment discrimination laws.

Yet when it came down to the remedies, you mentioned that for undocumented workers, they may have no remedy. What would you recommend to undocumented workers to do in this time period?

- That's a hard question, because they still have the right to file a complaint with the agencies and maybe get the conduct stopped, which has happened in some of the cases where the courts found that the employer violated, say, the National Labor Relations Act. And at least there was some sort of action by other workers as well that made it so that the employer had to stop the conduct.

But really, for workers who were unauthorized, it really puts them in a precarious position because they're coming out. And they run the risk of employers perhaps retaliating against them which, again, is unlawful under the act.

So, I mean, I think what a lot of people are recommending and a lot of immigrant worker advocates recommend is that workers as a whole exercise their right to collective action and try to effect change in their workplace by joining with others, because then they can have better protection.

But there are some agencies which do guard or don't inquire into the worker's immigration status. So the EEOC, OSHA still doesn't inquire into immigration status, Department of Labor. So workers should feel comfortable going to those agencies, at least, and maybe filing a complaint. They might stop short of a lawsuit after getting advice from an attorney.

- So Angela, not just for noncitizen workers, but for workers in general, do you feel as if there is a legal difference between those who are more personally at risk or more personally vulnerable to the COVID virus because maybe they have close family members at risk, or is there any difference between how the law should be addressing this?

- I would probably-- I mean, my thought is I would go back to Jason's answer to that earlier, which is I think for workers, the FMLA and the-- I don't want to say amendments, but to the expansion of FMLA that Congress did with the CARES Act, that that would definitely be something that workers could think about.

So like Jason was saying, workers who have family members who are under quarantine, or who they need to care for because of the pandemic, or that are experiencing health complications

related to it have more protection than workers who might just be afraid of coming down with COVID-19.

- All right. Thank you, Angela. Let me pose this question to all three of the panelists. I think depending upon how long-winded you are, we might get close to the end or not, but I have other questions if needed. If we're thinking about the COVID-19 situation, if I am an employee, what am I most concerned about in terms of my legal rights, and what do you think my legal rights are that would best protect me?

And if I'm an employer, if I'm a small business or a large business, what am I most concerned about the COVID virus in terms of dealing with my employees? I'll start with Paige, and then I go to Jason and Angela.

- OK. I think, Michael, that from an employer perspective, safety is paramount. Workplace safety and health of your employees is paramount. So I think that should be at the forefront of your thought process and that should guide your decisions. Look at this guidance that OSHA has put down. Look at some of the other guidance that I mentioned earlier in my presentation and do everything you can to keep your employees safe.

Certainly, you don't want to be rung up for any OSHA violations. But more importantly, you want to make sure your employees are safe. And this kind of tacks on to my earlier answer, too. And I was remiss in not mentioning you can and should encourage your employees to self-report if they have COVID-19 symptoms.

So while you might not be able to ask them directly, you should certainly encourage them to self-report any symptoms that they might be showing so that you can handle that accordingly, and also self-report if they've been exposed to someone who's tested positive to COVID, or perhaps traveled to a country where there are travel advisories in place.

So I think from that standpoint as an employer, I would focus on safety and make that paramount. And then secondly, obviously, Angela and I talked a little bit about the ADA. It's really important to be aware of those discrimination laws. This is a trying time for employers, and that's likely an understatement. But we know it's difficult.

You're navigating this unprecedented pandemic and you're having to make employment decisions really quickly, but stay vigilant. Be aware of those laws and make sure that to the extent that you're making decisions about employees with respect to COVID-19, whether it be leave, whether it be taking disciplinary actions or termination, I would really strongly advise that you go ahead and consult with legal counsel.

I know that's another extra step in an already stressful process, but it really is important in order to put employers in the most defensible position going forward to make sure that you are still complying with those discrimination laws, whether they be federal or state. So I think those are the things that need to be top of mind.

This situation is ever-evolving. And sometimes even when you know what laws apply, it's hard to know what's current and what's not. So it really is important to seek legal advice when making some of those decisions and err on the side of caution.

- OK. Thank you, Paige. Jason?

- I think the big thing that employees need to figure out is what their rights are when an employer either decides that they're not going to work or whether they're going to call them back to work. If you're not going to work, then you're going to have some opportunities for some expanded unemployment benefits at least through July.

Or if you're a gig worker or self-employed, you're going to have an opportunity to just have even the minimum level of unemployment beyond July. So that's available if you're not able to work, or if you aren't able to work because you have to care for a child, or if you're not able to work because you have to stay home with someone who has COVID-19 symptoms, or you have COVID-19 symptoms, or you've been diagnosed.

And so you can get unemployment benefits. There are some Family Medical Leave amendments that expand protection to you. And then coming back to work, I think you need to, as Paige talked about, you need to have an awareness that your employer has a duty under federal law to provide you a safe workplace.

And a safe workplace is taking proper, reasonable precautions, good faith precautions to make sure both the employee as well as the customer aren't exposed to this. And so I think those are the two things, the different sides of the coin that employees need to think of.

The last thing I'd say-- and I've had people call me who have jobs and who are frustrated with their employer because their employers get nit-picky. And when there's a tight labor market-- three months ago, we had the best economy in the world. I had someone who was fired for filing a sexual harassment complaint. And then within three weeks, they'd find a better paying job.

Those days are gone. We're going to have at least two years of a very tight employment market. And people are going to have a hard time finding work or holding on to work, even with the best employers with the best intentions. So I've had several people call me and say, well, I don't really like my employer. I think I'm just going to quit and go work someplace else.

And I've implored them to not leave their jobs, or at least to think very, very deliberately about leaving a job, because I don't think most people fully see the icebergs that are in the employment market. And the icebergs are running deep. We're going to have the worst unemployment we've had at least since the Great Depression, maybe higher than the Great Depression.

And then even when people start coming back to work at 25%, or 50%, or 100%, there are going to be a lot of businesses that don't open, reopen. And so there are going to be a lot of jobs that just aren't available that were there before. And it's going to get really bad, and workers need to realize that. And that's going to impact their ability to find work in this economy.

- All right. Angela, your thoughts.

- Well, so in an ideal world, I want to think that most employers want to do the right thing and most employees want to work in a workplace that respects them. So one of the things I think that both employers and employees could really do is talk to each other and listen to each other about what the other needs to be able to either open the business or to be able to come back to work.

But short of that, for workers in particular, what I found interesting are some of the reports on the meat in the meatpacking industry, workers who are refusing to come back to work because the conditions are so dangerous.

So I think at a certain point, even with a tight labor market, that workers could maybe, and if they need to, prioritize especially when you look at some of those conditions that those workers were under, their own safety and their own health, especially when the jobs themselves might not be as desirable or as well-paying to make the risk worth it.

So one, I hope that people will be reasonable and try to work with each other. And short of that, I think workers in particular need to prioritize their own health, and safety, and well-being.

- All right. Thank you. I see one last question came in, and I think this is for Paige. Let me ask this quickly before I sum up. It's back to asking about the symptoms. And the question says, "My understanding is that the EEOC had indicated that employers could ask about symptoms to determine if they were a direct threat. Has that been changed?"

I think you said you talked about that a little bit, but has that been changed? And then when screening employees-- I'm sorry. I can see her. She's nodding her head no. When screening employees entering the workplace, may an employer only ask employees about the COVID symptoms? Because the EEOC has certain other examples that they may ask about regarding public health authorities as associated with COVID. What do you think?

- OK. That's a good question. In response to the first part of the question, the guidance has not changed. The EEOC has made it clear that you can and should ask employees about symptoms to the extent that they self-report that they're experiencing symptoms, or to the extent you learn it from somebody else, or you personally observe it. You should ask about those symptoms.

And you should take action to remove them from the workplace, because there is a potential that they have COVID-19, and you need to act accordingly. And then you need to go to the people that they-- you need to ask them to identify the people that they've had contact with within the last 48 hours. And by contact, I mean prolonged, close contact within six feet for a period of 10 to 30 minutes. And you need to alert those people.

You would never give the employee's name. That is confidential and should be kept as such. But you want to make those people aware, and you want to send those people home, too. Well with respect to the second part of that question, you need to stick to asking only about COVID symptoms.

The EEOC in their guidance has a pretty, pretty thorough list of what those symptoms are, the primary ones being fever, dry cough, difficulty breathing, and things of that nature. But I would not go beyond those symptoms.

- OK. Well, I see my time is running out. Let me just mention a few last things before we sign off. I've got two final comments. Additional webinars are forthcoming. And you should check <http://tamulawanswers.info>, our website, for updates.

There, you will find the videos, the slides, and the transcripts of all our past webinars on that website. And within probably two days, you will also see the video, the slides, and the transcripts for today's webinar should be posted by then.

For my final comments all of you, we know this is a webinar about issues that affect workers. We would be remiss if we did not take time to thank the doctors, the nurses, the first responders, the grocery store, the public utility, transportation, restaurant, manufacturing workers who supply tissue paper, meat and food processing, package and food delivery, and all the many other workers out there who are facing uncertainty while providing so many necessary services to all of us during this pandemic.

We appreciate you. We hope that you all learned something today about how to make the workplace a little better despite COVID-19. And I hope you all have a wonderful Tuesday. Thank you.

While the panelists are all 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.

Need additional assistance?

Online Resources

Check out the list of helpful [online resources available](#) to you regarding the CARES Act and other actions and topics related to the coronavirus pandemic.

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 5pm – 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 or by clicking [here](#).