

Work Environment After Coronavirus

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OVERVIEW

- Work Environment After Coronavirus
 - Department of Labor
 - Equal Employment Opportunity Commission (EEOC)
 - HR Considerations
- How do these considerations factor into:
 - Remote Workforces
 - Return to Work
 - Addressing Threats of COVID in the Workplace
 - Time Off During a Pandemic
 - Pandemics & Personnel Predicaments

FAMILY FIRST CORONAVIRUS RESPONSE ACT



FAMILIES FIRST CORONAVIRUS RESPONSE ACT ENACTMENT

- Families First Coronavirus Response Act (“FFCRA”)
Passed March 18, 2020
- Effective April 1, 2020 – December 31, 2020
- Composed of two benefits for eligible employees of covered employers:
 1. Emergency Paid Sick Leave
 2. Emergency Family & Medical Leave Expansion

FFCRA APPLICATION TO PUBLIC AGENCIES

- FFCRA applies to public agencies, defined as:
 - Government of the United States;
 - Government of a state or political subdivision of a state; or
 - An agency of the United States, a state, or a political subdivision of a state, or any interstate governmental agency.
- Tax credits not available for public agencies

EMERGENCY PAID SICK LEAVE

- **Employee Eligibility:**

- All employees, regardless of tenure
- May exclude health care providers and emergency responders

- **Leave Entitlements:**

- **Full-time employees:** Two weeks (up to 80 hours) paid sick leave
- **Part-time employees (regular schedule):** The number of hours that they work, on average, over a two-week period
- ***Special rules for part-time employees that work varying schedules and new hires**

EPSLA REASONS FOR LEAVE

1. Subject to federal, state, or local quarantine or isolation order related to COVID-19
2. Self-quarantine advice from health care provider due to COVID-19 related concerns
3. Experiencing COVID-19 symptoms and seeking a diagnosis

EPSLA REASONS FOR LEAVE

4. Caring for an individual subject to federal, state, or local COVID-19 quarantine or isolation order, or an individual that has been advised to self-quarantine by a HCP
 - Immediate family member, person who regularly resides in employee's home, or relationship that creates expectation employee would care for person if quarantined
5. Caring for own child because child's school or day care is closed due to COVID-19
 - Child must be under 18 years of age; or
 - Age 18 or older who is incapable of caring for himself or herself because of a mental or physical disability
6. Employee is unable to work due to other substantially similar condition specified by the Secretary of Health and Human Services.

EPSLA REQUIRED COMPENSATION

- At regular rate for EPSLA reasons 1, 2 and 3
 - Cap at \$511/day or \$5,110 total
- At 2/3 regular rate for EPSLA reasons 4, 5 and 6
 - Cap at \$200/day or \$2,000 total

EPSLA USAGE RULES

- Employers may not require use of other paid leave before using EPSLA leave
- Employees are not entitled to pay out of unused EPSLA leave upon separation of employment

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION

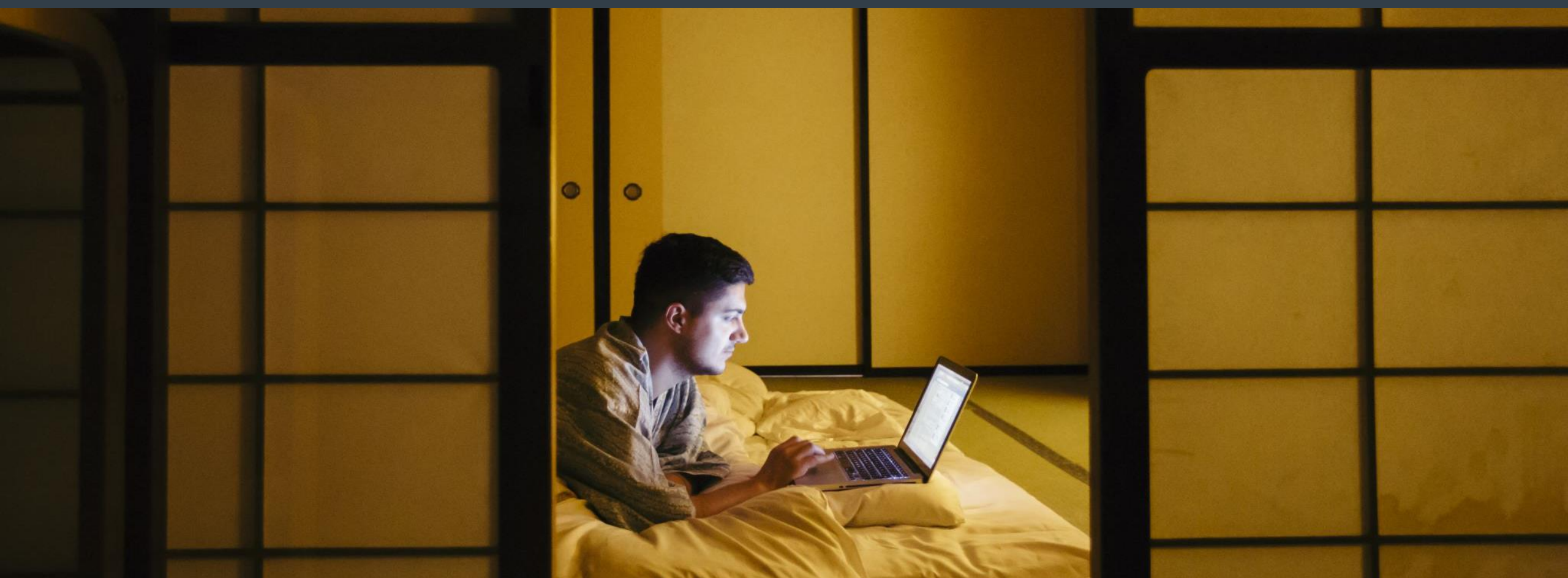
- **Employee Eligibility:**

- All employees employed for at least 30 calendar days
- May exclude health care providers and emergency responders

- **Leave Entitlement:**

- Up to 12 weeks to care for **minor child** whose school or place of care is closed
 - First 2 weeks unpaid (may use EPSLA or other available leave)
 - 10 weeks at 2/3 employee's regular rate
 - Cap at \$200/day or \$10,000 total
 - Minor child
 - children under 18 years of age; and
 - children age 18 or older who are incapable of self-care because of a mental or physical disability

REMOTE WORKFORCE



MANAGING A REMOTE WORKFORCE: DOL CONSIDERATIONS

What steps should organizations take to make sure they are meeting legal obligations with respect to managing a remote workforce?

MANAGING A REMOTE WORKFORCE: DOL CONSIDERATIONS

Follow Department of Labor Guidance

- Required hours
- Time reporting policies

Fair Labor Standards Act

- Cost of working from home
 - Generally not required to reimburse
 - Be cautious of deductions

DOL REGULATIONS DAYTIME FLEXIBILITY & WORKING FROM HOME

When managing a remote workforce, what do employers need to consider in terms of compensating employees for hours worked?

DOL REGULATIONS DAYTIME FLEXIBILITY & WORKING FROM HOME

General Rule

- Payment for hours between first and last principal activities of workday

During Pandemic

- Employers are not required to compensate for first and last principal activities
 - Teleworking arrangement with flexible hours
 - Increased need for flexibility
 - Compensation for hours actually worked

REMOTE WORKFORCE: HR CONSIDERATIONS

What are some general HR considerations when managing a remote workforce?

REMOTE WORKFORCE: HR CONSIDERATIONS

- Set clear expectations and communicate regarding:
 - Productivity
 - Availability and Work Hours
 - Data Privacy & Security
 - Recording Work Time
- Statement of understanding and acknowledgement or agreement

RETURN TO WORK



RETURN TO WORK: HR CONSIDERATIONS

What HR considerations do employers need to account for when they are ready to bring their employees back to the workplace?

REMOTE WORKFORCE: HR CONSIDERATIONS

Communication is key

- Expectations
- Precautions
- Protocol

Precautions

- Masks, distancing, directional movement, cleaning provisions, self-monitoring, reporting, expectations

Accommodations

Certifications

Updated Guidance

RETURN TO WORK: HR CONSIDERATIONS

What should employers do if an employee refuses to return to the workplace?

RETURN TO WORK: HR CONSIDERATIONS

Outline Return-to-Work Guidelines

- Communicate expectation and protocols taken for safety

Inquiry and Dialogue

- Determine the reason for objection
- Does the FFCRA or ADA apply?

Safety Protocol

- OSHA Guidance
- CDC

Leave Options

- FFCRA
- PTO
- FMLA

Explanation of Attendance Policy

Discipline or Termination

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

Are there intersections between COVID-19 and the ADA?

Is COVID-19 a disability?

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

- YES!
 - An employee with a disability under the ADA may need an accommodation due to COVID-19.
 - The ADA prohibits employers from making disability-related inquiries and medical examinations unless certain conditions are met.
 - ADA requires employers keep medical information confidential.
- COVID-19 as a disability
 - The EEOC has not currently provided guidance on this issue.
 - The ADA generally requires individualized assessments based on a reasonable medical judgment about this employee's disability.
 - Be careful not to “regard” someone as disabled due to COVID-19 related symptoms.

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

Under the ADA to what extent can employers screen?

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

- Screening must apply the same to all employees
- Types of COVID-19 screening
 - Most common are temperature checks and questionnaires regarding symptoms
 - Viral Test vs. Antibody
- If employees refuse to participate in screening measures, employer may bar from workplace.

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

Other Screening Considerations:

- Can an employer ask about . . .
 - Symptoms
 - Exposure
 - Travel
 - Underlying conditions
 - Reason for an employee's absence during pandemic

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

Other Screening Considerations:

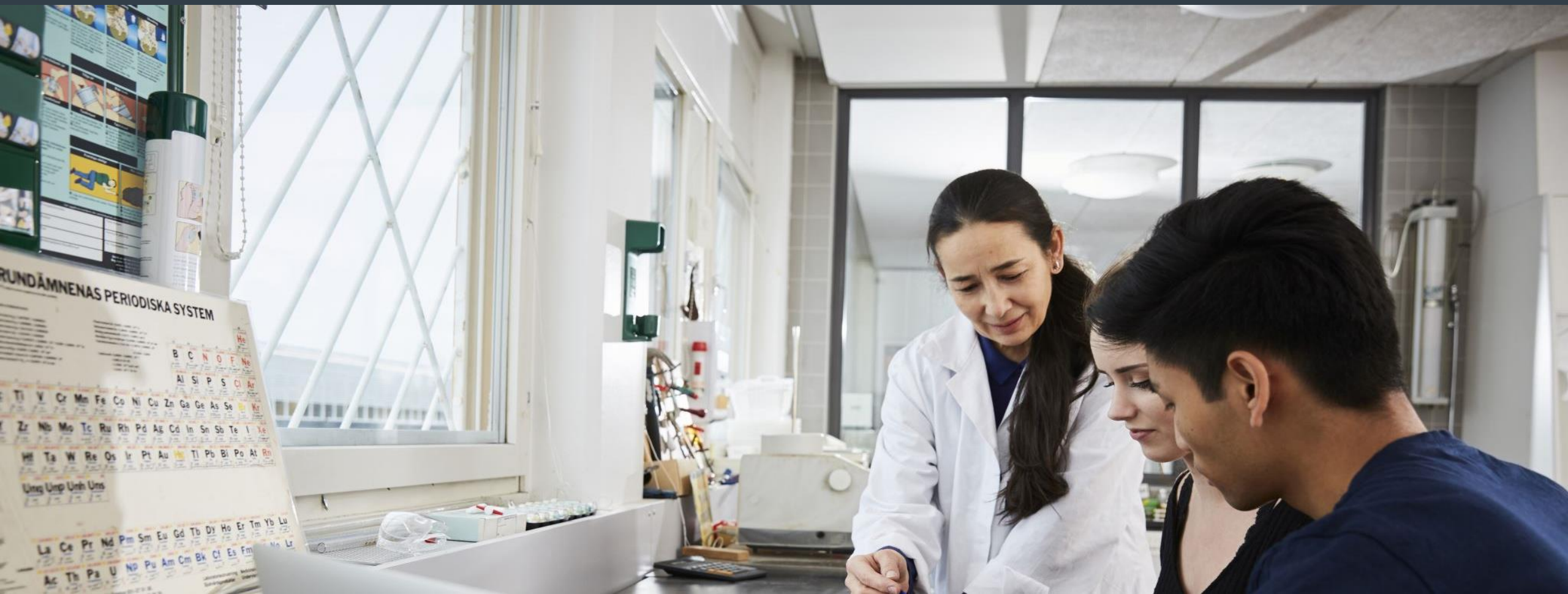
- Can an employer . . .
 - Send employees home if present symptoms
 - Take an employee's temperature
 - Require a doctor's note before returning to work
 - Require employees to test negative
 - Compel vaccination
 - Require use of PPE

RETURN TO WORK: ADA & PERMISSIBLE PRECAUTIONS

Other Screening Considerations:

- **Confidentiality**
 - Storage of information obtained during screening
 - Access to information obtained during screening

ADDRESSING THREATS OF COVID IN THE WORKPLACE



THREATS IN THE WORKPLACE: ADDRESSING EXPOSURE

When is an employee considered “exposed” to COVID-19?

THREATS IN THE WORKPLACE: ADDRESSING EXPOSURE

- Exposure
 - Close contact
 - Positive test
 - Symptoms
- Timeframe
- Self-isolate

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

What is a “direct threat”?

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

- **Direct threat:** “Significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
 - Requires an individual assessment based on best available objective medical evidence.
 - Factors:
 - (1) Duration of risk;
 - (2) Nature and severity of potential harm
 - (3) Likelihood of occurrence
 - (4) Imminence of potential harm

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

If an employee presents a direct threat, can the employer prevent that employee from entering the workplace under the ADA?

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

- Normally, employers cannot exclude individuals with disabilities for health or safety reasons.
- However, employer may exclude those employees that pose a “direct threat.”
- EEOC guidance states COVID-19 meets direct threat requirement.
 - Employers may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because their presence would pose a direct threat to the health or safety of others.

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

Can employers exclude employees who do not have COVID, but are part of an identified vulnerable population?

THREATS IN THE WORKPLACE: ADA & KEEPING COVID OUT

ADA:

- Employers may not involuntarily exclude individuals based on disability
 - Would need to show employee poses “direct threat to self”
 - Employer would need to engage in interactive process to determine if accommodation is available.
 - Disabilities listed by the CDC are **INSUFFICIENT** to meet direct threat standard

ADEA:

- Employers may not exclude based on age

THREATS IN THE WORKPLACE: HR CONSIDERATIONS

When do I need to tell my employees not to come to work due to COVID-19, and when can they return to work?

THREATS IN THE WORKPLACE: HR CONSIDERATIONS

Do Not Come In If:

- Positive test
- Direct exposure
 - Close contact → within 6 feet for more than 15 minutes
 - With a person with COVID-19 in the period from 2 days from symptom onset/positive test until they meet the criteria for discontinuing home isolation
- Symptoms

THREATS IN THE WORKPLACE: HR CONSIDERATIONS

Welcome back when:

- If symptomatic:
 - 10 days since symptom onset
 - No fever for 24 hours without medicine, and
 - Improved symptoms
- If positive but asymptomatic:
 - 10 days passed since testing with no symptoms

TIME OFF DURING A PANDEMIC



TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

If FFCRA leave is not available, are there other available avenues for employees to get time off due to Coronavirus?

TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

There are other available avenues:

- ADA & FMLA: provide unpaid time off
- FMLA:
 - Covers incapacitation due to serious health condition
 - Covers those needed as caregivers for family member who is incapacitated by serious health condition
 - Not as broad as FFRCA:
 - Does not cover need to stay home due to closed childcare, remote learning

Regardless if covered, encourage those sick or exposed to stay home!

TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

How should employers handle employees who request time off to assist children with remote learning because they are not comfortable with sending their children back to school?

TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

DOL Guidance & FFRCA:

- Time off when parents/children *opted* for remote learning voluntarily is not covered by FMLA leave
- Employees can use accrued PTO

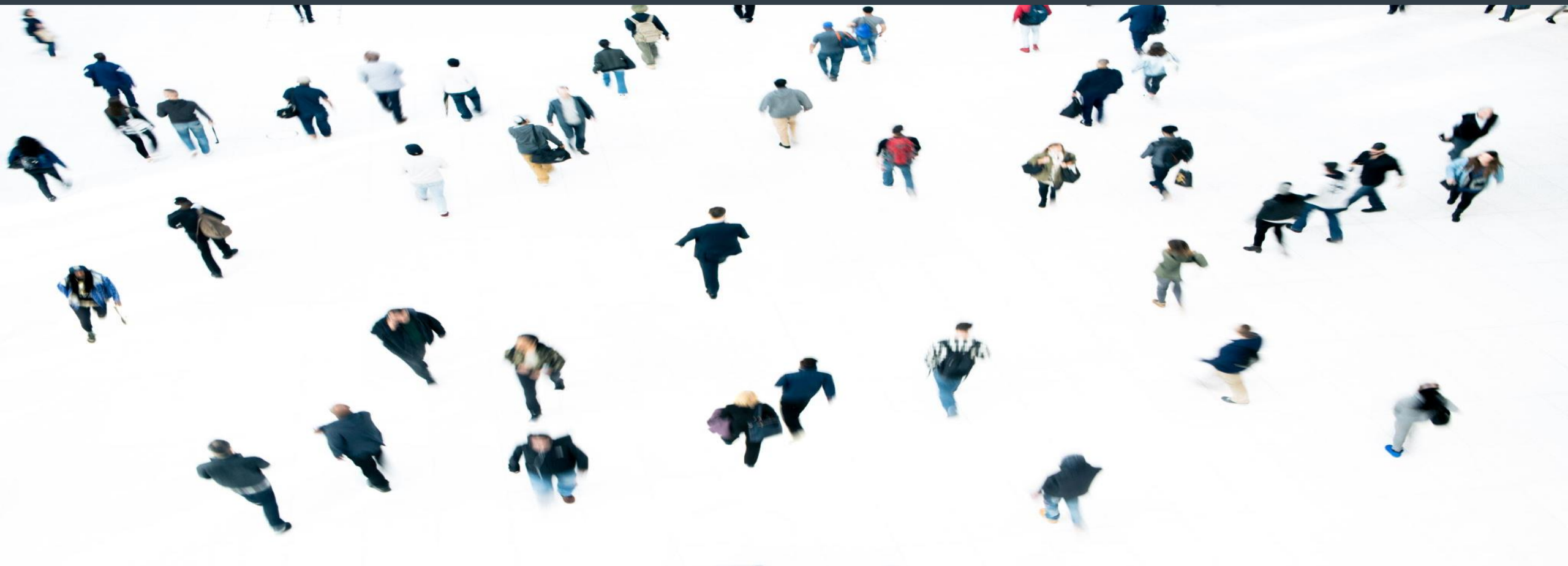
TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

What sort of challenges can employers expect specifically related to remote learning and time off?

TIME OFF DURING A PANDEMIC: DOL CONSIDERATIONS

- Different policies for different schools
 - Different mandates with remote learning
 - Different hours
- Schools in session for less time
- Requires more flexibility with workers who have school-aged children

PANDEMICS & PERSONNEL PREDICAMENTS



PANDEMICS & PERSONNEL: DOL CONSIDERATIONS

Is there a risk of losing an exemption status under the FLSA if a salaried executive, administrative, or professional employee is assisting with additional or different activities during the pandemic (e.g., more cleaning activities)?

PANDEMICS & PERSONNEL: DOL CONSIDERATIONS

- FLSA permits employees who otherwise qualify for 13(a)(1) exemption to perform nonexempt duties during emergencies
 - Emergency means a threat to “the safety of employees, a cessation of operations or serious damage to the employer’s property”
- During public health emergency, otherwise exempt employees may take on more cleaning activities
 - Required by emergency and does not threaten exemption
 - Must continue payment of salary of at least \$684/week

PANDEMICS & PERSONNEL: ADA & COVID INQUIRIES AS PART OF HIRING PROCESS

Can employers conduct medical examinations to determine if a potential new hire has COVID?

PANDEMICS & PERSONNEL: ADA & COVID INQUIRIES AS PART OF HIRING PROCESS

- Before conditional offer of employment?
 - No
- After conditional offer, when employee is just beginning work?
 - Permissible
 - Must do the same for all new employees in the same job category and subject to the same inquiries and examination
 - If applied differently, risk Title VII violation
- During Employment
 - Generally Permissible
 - Reasonable belief based on objective facts that direct threat exists due to medical condition

PANDEMICS & PERSONNEL: ADA & ACCOMMODATIONS

What does a reasonable accommodation look like during a pandemic?

PANDEMICS & PERSONNEL: ADA & ACCOMMODATIONS

- A reason accommodation is any “change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job’s essential functions, or enjoy equal benefits and privileges of employment.”
- Employer must provide reasonable accommodations to the known limitations of applicants and employees (absent showing undue hardship)
 - Undue hardship: significant difficulty or expense
 - If undue hardship: not required to provide
- Reasonable accommodations may be necessary if pre-existing disability places employees at higher risk during pandemic

PANDEMICS & PERSONNEL: ADA ACCOMMODATIONS

Are accommodations available for employees who act as a caretaker for someone who has a disability that make them more vulnerable to COVID-19?

Do employers have to accommodate an employee who fears contracting COVID-19 at work and bringing it home to a vulnerable relative?

PANDEMICS & PERSONNEL: ADA & ACCOMMODATIONS

- ADA does not require an employer to accommodate an employee based on association to an individual with a disability

THANK YOU!



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